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Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1955
CERTIORARI GRANTED JUNE 6, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

against

WILLIAM LUDWIG ULLMANN, APPELLANT.

APPENDIX TO APPELLANT'S BRIEF. Filed March 16, 1955

[fol. 2] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

IN RE:

WILLIAM LUDWIG ULLMANN.

APPLICATION OF J. EDWARD LUMBARD, U. S. ATTORNEY, FOR AN ORDER REQUIRING WILLIAM LUDWIG ULLMANN TO TESTIFY BEFORE GRAND JURY

J. Edward Lumbard, United States Attorney for the Southern District of New York, hereby makes application for an order instructing William Ludwig Ullmann to testify and produce evidence, pursuant to the provision of Title 18, United States Code, Section 3486, as amended, and respectfully alleges as follows:

1. William Ludwig Ullmann was subpoenaed to appear and did appear on the 3rd day of November, 1954, before a duly constituted grand jury of the Southen District of New York sitting at New York, New York. This grand jury was then and there inquiring into matters [fol. 3] involving the interference with an endangering of, and plans and attempts to interfere with and endanger, the national security and defense of the United States by espionage, and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere.

2. The grand jury asked William Ludwig Ullmann the

following questions, among others, relating to the above matters:

Q. Mr. Ullman, the Government has information to the effect that during the years from 1941 through 1945, inclusive, various persons employed within the Government of the United States did engage in a common enterprise, having as its objective the obtaining from Government files of classified information relating to the national defense and security of the United States, and having the further objective of transmitting such information to a member or members of the Communist Party, thence to agents of a foreign power in New York City.

Do you have knowledge of such activities, sir?

Q. Did you yourself participate in such activity?

Q. Mr. Ullman, have you met a woman known as Elizabeth Bentley?

Q. To your knowledge, did Elizabeth Bentley participate in the activity which I have described to you?

Q. To your knowledge, did Elizabeth Bentley participate in such activity with you?

Q. To your knowledge, was Elizabeth Bentley a member of the Communist Party, at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Nathan Gregory Silvermaster participate in the activity which I described to you?

[fol. 4] Q. To your knowledge, did Nathan Gregory Silvermaster participate in such activity with you?

Q. To your knowledge, was Nathan Gregory Silvermaster a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Helen Silvermaster participate in the activity which I described to you previously?

Q. To your knowledge, did Helen Silvermaster participate in such activity with you?

Q. To your knowledge, was Helen Silvermaster a member of the Communist Party, at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Abraham George Silver-

man participate in the activity which I have previously described?

Q. To your knowledge, did Abraham George Silverman participate in such activity with you?

Q. To your knowledge, was Abraham George Silverman a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Harry Dexter White participate in the activity which I described to you at the outset?

Q. To your knowledge, did Harry Dexter White participate in such activity with you?

Q. To your knowledge, was Harry Dexter White a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. Had you met a person by the name of Lauchlin Currie?

Q. To your knowledge, did Lauchlin Currie participate in the activity which we have been discussing here?

[fol. 5] Q. To your knowledge, did Lauchlin Currie participate in such activity with you?

Q. To your knowledge, was Lauchlin Currie a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. Have you met a person by the name of Irvin Kaplan?

Q. To your knowledge, did Irvin Kaplan participate in this activity which I have previously mentioned to you?

Q. To your knowledge, did Irvin Kaplan participate in that activity with you?

Q. To your knowledge, was Irvin Kaplan a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Harold Glasser participate in this activity which I have previously mentioned to you?

Q. To your knowledge, did Harold Glasser participate in such activity with you?

Q. To your knowledge, was Harold Glasser a mem-

ber of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did any person or persons not named by me participate in such activity?

Q. Were you a member of the Communist Party at any time during the years from 1941 to 1945, inclusive?

Q. Mr. Ullman, did you at any time during the years from 1941 to 1945, inclusive, photograph Government documents containing information relating to the national defense and security of the United States in the basement of the residence shared by Nathan Gregory Silvermaster, Helen Silvermaster and yourself?

[fol. 6] Q. Did you at any time during the years from 1941 through 1945, inclusive, deliver to Elizabeth Bentley photographs, either developed or on undeveloped film, of Government documents containing information relating to the national defense and security of the United States?

3. ~~William~~ Ludwig Ullmann refused to answer the above questions on the ground that his answers might tend to incriminate him.

4. In my judgment as United States Attorney for the Southern District of New York, the testimony of William Ludwig Ullmann concerning the matters under inquiry and his response to the above questions are necessary to the public interest of the United States.

5. This application is made with the approval of Herbert Brownell, Jr., Attorney General of the United States. A copy of a letter from the Attorney General expressing such approval is attached hereto as Exhibit A.

Wherefore, I, J. Edward Lumbard, United States Attorney for the Southern District of New York, request the Court to order William Ludwig Ullmann to answer the above questions and to testify and produce evidence relating to the matters under inquiry, pursuant to the provisions of Title 18, U.S.C., Section 3486, as amended.

J. Edward Lumbard, United States Attorney.

Letter of Attorney General in Support of Application of U. S. Attorney.

OFFICE OF THE ATTORNEY GENERAL
Washington, D. C.

November 3, 1954.

J. Edward Lumbard, Esquire
United States Attorney
New York, New York

Dear Mr. Lumbard:

It is my understanding that on Wednesday, November 3, 1954, William Ludwig Ullmann appeared before a grand jury in the Southern District of New York which is inquiring into alleged interference with and endangering of the national security or defense of the United States by espionage and conspiracy to commit espionage. It is my further understanding that William Ludwig Ullmann refused to answer material questions on the ground of the privilege against self-incrimination afforded him by the Fifth Amendment to the Constitution of the United States.

You have informed me that it is your judgment that the testimony of William Ludwig Ullmann is necessary to the public interest. With this judgment, I am in complete accord. You are, therefore, authorized to make application to the United States District Court for the Southern District of New York for an order instructing the witness to testify and produce evidence pursuant to the provisions of the Immunity Act of 1954 (P.L. 600, C. 769, 83rd Cong. 2d Sess., Title 18, Sec. 3486, as amended).

Sincerely,

Herbert Brownell, Jr., Attorney General.

[fol. 8] In United States District Court

State of New York
County of New York
Southern District of New York, ss.:

Affidavit of J. Edward Lumbard, U. S. Attorney, Dated November 18, 1954, in Support of Application

J. Edward Lumbard, being duly sworn, deposes and says:

1. I am the United States Attorney for the Southern District of New York.

2. This affidavit is submitted in compliance with the Court's request on November 10, 1954 (Tr. pp. 67-8) and in support of my application for an order directing William Ludwig Ullmann to answer certain questions.

3. My conclusion that Mr. Ullmann's testimony is necessary to the public interest was arrived at only after long and careful consideration of all the pertinent facts in many conferences with William F. Tompkins, the Assistant Attorney General in charge of the Internal Security Division and his assistants, Mr. L. E. Broome and Mr. B. Franklin Taylor.

4. I was present before the Grand Jury on November 3, 1954 throughout the whole of Mr. Ullmann's testimony before the Grand Jury on that day.

5. This application is based on the belief that the information sought is necessary and material to the investigation now being conducted by the Grand Jury with respect [fol. 9] to espionage and related crimes in violation of the statutes set forth in the Immunity Act of August 20, 1954. It is respectfully submitted that the pursuit of investigations such as this was exactly what the Congress had in mind when it passed said Immunity Act. For these reasons it is clear that this application is made in good faith and I assert that it is made in good faith.

J. Edward Lumbard.

(Sworn to November 18, 1954.)

In United States District Court

Affidavit of William L. Ullmann, Dated November 17, 1954, in Opposition to Application of U.S. Attorney

William L. Ullmann, being duly sworn, deposes and says:

I make this affidavit in opposition to the application by the Government to the Court for an order granting me immunity.

In the memorandum being submitted to the Court together with this affidavit, my attorneys present all the legal arguments in opposition to the Government's application. This affidavit is submitted in support of only one of these points, to wit, if the immunity statute is constitutional, then this is a case in which the Court should none the less exercise its discretion by denying the Govern- [fol. 10] ment's application for an immunity order (Point 5) in the memorandum on my behalf).

This affidavit sets forth my experiences with the investigatory and prosecuting agents of the Department of Justice and with Congressional investigating committees during the seven and a half year period beginning in April, 1947. I also set forth other relevant information from Congressional committee hearings and other public records. These facts show that if I deny the charges against me the Government, particularly the Department of Justice, will not be satisfied without trying to indict me for perjury if it is unable to support an indictment against me for espionage or for conspiracy to commit it.

I am not suggesting that if I lie to the Grand Jury I should not suffer the normal consequences. What I do say, however, is that the Department of Justice (and Congressional committees) are so unequivocally on record as to my guilt that the Government has left itself no alternative except to seek my indictment for perjury if I assert my innocence.

The answer to this might be that these are risks that any accused person faces under our system, be he innocent or guilty. This may be a sufficient answer in the normal case. But the difference is that in the ordinary case the Government investigates the charges with something of

an open mind; at least, the chief prosecuting officers do not before indictment normally announce that there is not the slightest doubt of the guilt of the accused. In my case, however, the Government has put itself on record, on occasions attended with publicity of a sensational character, that the charges against me are true. This is why I say that the Government cannot be satisfied with anything else except either my admission of the substantive charges or a prosecution against me for perjury.

[fol. 11] If this is so, then one of the alternatives which should be open to me if the Court does grant me immunity will actually be a trap rather than a true alternative. In other words, if I deny the accusations against me, the Government has put itself in a position where it must use every means at its command to prove I have perjured myself. If it is unable to do so on a major question, it will try to do so on a minor or related one. If it is unable to do so on a minor or related question, it will try to do so on a tangential or unrelated one. To put it another way, the Department of Justice has put itself in such a position, both as the prosecutory agency of the Government and also from the standpoint of partisan politics, that it must use all means at its command to support the charges against me or to have me convicted of perjury for one thing or another.

The Charges By Miss Elizabeth Bentley—The questions put to me before the Grand Jury on November 3, 1954 which are contained in the application of the United States Attorney grow out of testimony and statements made by one Elizabeth Bentley. These questions indicate the essence of Miss Bentley's accusations against me, to wit, that during the wartime period, 1941-1945, I was a member of an espionage "ring" in Washington, composed of Government employes or officials, which was headed by N. Gregory Silvermaster and which included Harry White and Lauchlin Currie among several others; that the persons in the group, including myself, were members of the Communist Party; that "classified information relating to the national defense and security of the United States" (paragraph 2 of the application) was obtained by members of the group from Government files and turned over to Miss Bentley to be turned over by her in turn "to agents of a foreign power" (ibid.).

[fol. 121] Before I relate what took place on April 15, 1947, when I was interrogated by agents of the F.B.I., I should explain that I first learned of Miss Bentley's charges on July 31, 1948 when she made her initial public appearance as a witness before the House Committee on Un-American Activities (80th Cong., 2nd Sess., *Hearings Regarding Communist Espionage in the United States Government*). I also learned then that Miss Bentley had been in touch with the F.B.I. since 1945. Therefore, I was not yet aware, in April, 1947, of the fact that Miss Bentley had theretofore been in contact with the F.B.I.[1]

A brief chronological outline of the eight occasions on which I have been questioned about Miss Bentley's charges (and other matters) may assist the Court in following the thread of my narrative. Except for my interrogation by agents of the F.B.I. in April, 1947, I was questioned on the seven other occasions pursuant to subpoena:

1. Interrogation by agents of the F.B.I. on April 15, 1947.

2. *November, 1947*—Before a Grand Jury in this district.

3. *August 10, 1948*—At a public hearing of the House Committee on Un-American Activities in Washington. (These were the same hearings in which Miss Bentley gave her initial public testimony on July 31 and on August 4, August 9, August 10, and August 11, 1948.)

[fol. 434] 4. *October, 1953*—At an executive session of the Senate Subcommittee on Investigations (the so-called McCarthy Committee) in New York.

5. *October 21, 1953*—At a public hearing of the Subcommittee on Government Operations Abroad Of The Senate Subcommittee on Investigations in Washington.

6. *December 2, 1953*—At a public hearing of the Subcommittee To Investigate The Administration of the Internal

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[1] Since July, 1948, Miss Bentley has testified before Congressional committees on other occasions and has also been a witness in several trials. It is also public knowledge that she has also testified before Grand Juries from time to time. In addition, she has written a book and magazine and newspaper articles, and has been interviewed frequently in the press and on radio and television.

Security Laws (the so-called Jenner Committee) in Washington.

7. *October 25, 1954*—Before a Grand Jury in Washington, D. C.

8. *November 3 and November 8, 1954*—Before the present Grand Jury.

I should also state at this point that I was employed in the Government from the Spring of 1935 until March, 1947, at which time I voluntarily resigned from my position as economic analyst in the Treasury Department. My first government employment was with the National Industrial Recovery Administration. I was then with the Farm Security Administration of the Department of Agriculture, and beginning in 1939 I was in the Treasury Department until March, 1947, except for a three-year period in the Army from 1942 to 1945.

My Interrogation By Agents Of The F.B.I. On April 15, 1947—Following my resignation from the Treasury, I continued to reside at 5515 30 Street, N.W., in Washington, where I had made my home since 1938 with Mr. Silvermaster and his wife, Helen. (I should explain that I am unmarried.)

[fol. 14] On April 15, 1947, about a month after I had left the Treasury, two agents of the Federal Bureau of Investigation came to my home at about 5:30 p.m. I made no memorandum at the time of the following details, so I am stating my best recollection after seven and a half years. Aside from that, I assume that the records of the F.B.I. will show what happened on that date, and although I would not want to concede now the completeness or accuracy of such records, I would be willing to have such records disclosed to the Court.

The agents identified themselves as Agents Wildeman (I am uncertain of the spelling) and Mossberg. They stated that they had a very confidential matter concerning another person to discuss with me. Although I said I preferred to talk to them at my home, they prevailed upon me to go with them to F.B.I. headquarters where, they said, they had a group of files they could refer to. When I told them that I had not yet had dinner, they assured me that they would have some food sent in to their offices.

The agents drove me to the offices of the F.B.I., where I was questioned behind locked doors until the same agents drove me home at about 11:30 p.m. During the questioning, there were always two agents present. However, a total of five agents actually participated because at one point Mr. Mossberg was replaced by an agent by the name of Taylor; later, Mr. Taylor was succeeded by a fourth agent; at a still later point, the fourth agent was succeeded by a fifth, who left when Mr. Mossberg returned to the room towards the end of the questioning. (I do not have the names of the fourth and fifth agents.)

I am prepared at any time to testify in detail about the character of the questioning and the insults and threats [fol. 15] which went with it, but I merely summarize here so as not to burden this affidavit unduly. I was asked the questions about espionage which were based on what I later learned, in 1948 as I have said, were Miss Bentley's charges. When I answered such questions in the negative, the agents accused me of lying, as they did also from time to time when I denied that I knew that this or that friend or acquaintance or Government associate of mine was a "red," and when I made other denials. I was asked such questions, for example, about the Silvermasters, about Harry White, about Lauchlin Currie, about Colonel Bernard Bernstein, and about a number of other persons.

The agents left no doubt that they were firmly convinced of my guilt. As I have said, they kept accusing me of lying. They told me at one point that I was "lucky" that the questioning was not taking place in a "red" country where, because of the denials I was making, my arm would already have been broken. They knew about my "good staunch" American parents in Missouri and that I would "hate" to see anything happen to them. They also knew that I would "hate" to see anything happen to my sister in New York.

The agents reminded me that I was "good American stock—not foreign riff-raff that came over on a crummy boat a few years ago"; I was not a "smelly foreigner." They told me that they would protect me if the Silvermasters were threatening my life, and that if I "co-operated," I could earn (in fact, they could almost "guarantee" it) large sums from writings, movies, lecture tours, etc. Their

parting words, when they left me at my home, were that they would see me in court.

My Appearance Before The Grand Jury In This District, In November, 1947—When I was served with a subpoena for this appearance, I consulted counsel and was advised of [fol. 16] my constitutional rights before I appeared. In my appearance before the Grand Jury, I therefore exercised my privilege under the Fifth Amendment to refuse to answer questions.

My Appearance Before the House Committee On Un-American Activities In Washington On August 10, 1948—Despite the fact that I knew I could also claim my privilege on this occasion, I answered many questions when I appeared before the Committee, particularly denying the basic charges made by Miss Bentley, but I still claimed my privilege with respect to questions about my political beliefs and affiliations and also questions which seemed designed to entrap me on subsidiary or minor or unrelated questions of fact.

Despite the obvious risks involved, I denied Miss Bentley's charges on this occasion because these hearings were attended by the most flamboyant and widespread publicity. I concluded that if I claimed my privilege to its fullest extent, my position would be misinterpreted by people generally because of the widespread notion that a claim of the privilege amounts to an admission of guilt.

In a prepared statement to the Committee I said, and repeated on the stand, that Miss Bentley's charges against me were false (80th Cong., 2d Sess., *Hearings Regarding Communist Espionage in the United States Government*, pp. 765, 774-775). In my prepared statement, I said:

> "The scurrilous charges made against me by Miss Bentley before this committee are false. I state categorically that she is a liar. I am and always have been a loyal American citizen. I never have betrayed any confidence reposed in me by my Government. I am not and never have been a spy or an agent of a foreign government. I have never photographed any Government documents." (p. 768)

[fol. 17] On the stand, I reiterated that I had never photographed any Government documents (p. 765) and that I had never turned any Government documents over to Mr. Silvermaster or to Miss Bentley or to anyone else (pp. 765-766). Despite these denials, the members of the Committee demonstrated by their questions, their statements, and their attitudes that they were convinced of my guilt.

These sworn answers in August, 1948, take on a peculiar significance in light of the disclosures made in November, 1953, more than five years later,[2] in testimony by the Attorney General and J. Edgar Hoover that, as early as November 7, 1945, the latter had already concluded that I and others were guilty and had advised the White House to that effect at that time. I will discuss that testimony at a later point in this affidavit, but here I direct attention to the fact that if Mr. Hoover had evidence enough of my guilt to so advise the White House in November, 1945, then he would have had at least as much evidence in April, 1947, when I denied Miss Bentley's charges to the F.B.I., and in August, 1948, when I denied the charges under oath to the House Committee. Yet despite the fact that the evidence against me was not presented in a court of law in November, 1945, or April, 1947, or August, 1948, Mr. Brownell and Mr. Hoover were still asserting my guilt in 1953, eight years after the latter originally put such an assertion in writing.

My Two Appearances Before The McCarthy Committee in October, 1953—The significance of my appearance before [fol. 18] Senator McCarthy in the executive session in New York is that it demonstrates how a person who is once accused in this area, like myself, is dragged by compulsory process into irrelevant or unrelated subjects and is made a whipping boy for whatever political or other purposes may

[2] It is true that quotations of that material and references to it had been made by Vice-President Nixon in 1950 and during the Presidential campaign in 1952, and that it had also been referred to during earlier hearings before the Jenner Committee in 1953 (Hearings, April 14, pp. 71-73). But the exact character of the material was not made fully clear, as far as I know, until the Attorney General and Mr. Hoover testified in November, 1953.

be served at the moment. In this instance, it was in the course of Senator McCarthy's investigation of "espionage" at Fort Monmouth that I was subpoenaed to testify, for no other reason that I could deduce than that I have been living in New Jersey since 1947, even if my home is miles from Fort Monmouth. I was interrogated about a host of people whose names meant nothing to me—as I swore under oath—and that was that. But not before Senator McCarthy and his staff gave me to understand that I was guilty of something or other.

My appearance on October 21, 1953, before a public hearing of Senator Mundt's Subcommittee of the McCarthy Committee (83rd Cong., 1st Sess., *Hearings Regarding Transfer Of Occupation Currency Plates—Espionage Phase*) illustrates how charges like Miss Bentley's have a way of expanding over the months and years, so that as soon as one set is denied or goes unanswered by the claim of privilege, another set confronts the accused. Only at about the time Mr. Mundt opened these hearings did I learn that Miss Bentley was accusing me (and others) of attempting to help her secure samples of American occupation currency during the war so that the Russians could counterfeit them.

This hearing, like the earlier one that month before Senator McCarthy, illustrates that if I am directed to answer questions before the Grand Jury, the process would be endless. Here I was asked about a certain matter for the first time. This process of introducing new charges could go on for years.

[fol. 19] Aside from this, the following statement made by Senator Mundt at the conclusion of these hearings also shows the extent to which my guilt had been pre-determined by Congressional committees as well as by the Department of Justice:

> "It seems to me we have a very clear-cut case here that offers no argument in the refutation, that while the Russian Government was operating diplomatically, and I might say successfully, to induce our Government to make a loan of its monetary plates to the Russians, they had the people whose names have been written into the record, on whom the evidence is clear by the

Communist functionary who had them under discipline, and by their failing to use an opportunity provided by this committee to deny these serious charges, the evidence is clear that Russia, while an ally of ours in the war, was using this over-and-under technique to obtain its objectives. In this particular instance the ultimate decision was made aboveboard. It is pretty clear that directives given by Miss Bentley to these high functionaries in the Treasury Department, including Mr. White, aided to a considerable degree in achieving the results that they desired after their stealing of the monetary samples failed to give them the proper type of material with which to counterfeit the notes which were being used.

"As the Chair announced at the beginning of these hearings, it was the specific purpose of this phase of the hearing to determine whether or not that over-and-under tactic was actually being employed. We have picked up bits of evidence here and there to that end: [fol. 20] "It seems clear, and stands without any argument against it, any refutation from any of the parties involved, that this apparatus was functioning in the manner which has been outlined." (p. 43)

My Appearance Before the Jenner Committee On December 2, 1953—These particular hearings (83rd Cong., 1st Sess., *Hearings On Interlocking Subversion In Government Departments*, Part 16) are the ones which were precipitated by the speech made by Attorney General Brownell in Chicago on November 6, 1953, in which he attacked President Truman's handling of the so-called Harry Dexter White case. It is worth noting that of all the accused persons named by Messrs. Brownell and Hoover, I was the only one subpoenaed to testify during the course of these particular hearings, but this may have been because all or most of the others still alive had already testified in the earlier 1953 hearings on this subject before the Committee.

Before I come to the testimony of the Attorney General and of Mr. Hoover in November, 1953, I should say that the Jenner Committee had already made a report on July 30, 1953 entitled, "*Interlocking Subversion in Government De-*

partments" (83rd Cong., 1st Sess.) in which I was named as one of those guilty of espionage (pp. 2, 17-18, 29). In addition, Mr. Jenner opened these hearings on November 12, 1953 by repeating for the record that the evidence before the Committee showed that myself and others "were implicated in the Communist underground organization directed by Soviet superiors" (p. 1069; pp. 1069-70).

When Mr. Brownell testified, he announced that he had "declassified" a "top secret" letter dated November 8, 1945 from J. Edgar Hoover to Brigadier-General Harry Hawkins-Vaughan, Military Aide to President Truman, and then went on to read the letter into the record (pp. 1113-1114). [fol. 21] In this letter, Mr. Hoover advised Gen. Vaughan that information in the possession of the F.B.I. indicated that Harry White, Lauchlin Currie, and I and others were members of a "ring" which had been turning over data to persons outside the Government to be transmitted to Soviet espionage agents.

Apparently, this letter of November 8, 1945, was the original communication from the F.B.I. of any kind relating to Miss Bentley's charges. However, Mr. Hoover testified that from November 8, 1945 to July 24, 1946, seven communications bearing on espionage activities, wherein Harry White's name was mentioned; went to the White House, and that during the same period, two summaries on Soviet espionage activities went to the Treasury Department and six to the Attorney General (p. 1144). Since a later letter to Gen. Vaughan (p. 1115), dated February 1, 1946, also mentions me in connection with Harry White, and since Mr. White's name has almost always been linked to mine by Miss Bentley, it may be assumed that my name was mentioned in all or in most of the other communications and summaries to which Mr. Hoover referred.

Aside from the fact that Mr. Hoover had made flat statements concerning my guilt in the letters of November 8, 1945 and February 1, 1946, both he and Mr. Brownell also testified independently when they appeared before the Jenner Committee in November, 1953, that I and others were guilty. Mr. Brownell said, for example, that "the basic facts" of the "ring" of which Miss Bentley had said I was a member (and of another "ring") had been "well

established by previous court procedures and by congressional committees" (p. 1142).

As far as congressional committees are concerned, and aside from the fact that under our system the courts and [fol. 22] not the Congress pass on guilt or innocence, Miss Bentley is the only person, as far as I know, who has given such testimony about me. As far as "court procedures" go, Miss Bentley's charges against me have of course never been tried in court.

At other points in his testimony, the Attorney General also referred to me as if there were no doubt of my guilt (pp. 1116-1117, 1119). The following paragraph from his testimony, referring to the report attached to the letter of February 1, 1946 to Gen. Vaughan, illustrates his attitude as well as his logic:

> "The report contains much corroborative evidence which cannot be made public either because it would disclose investigative techniques of the FBI or because it might be harmful to the national interest. It can be pointed out, however, that over a period of 3 months beginning in November of 1945 the activities of Harry Dexter White were entirely consistent with all the previous information contained in the report. White was in frequent close personal contact with nearly every one of the persons named as his associates in the spy ring. These include Nathan Gregory Silvermaster and his wife, William Ullmann, Sonia Gold, Harry Glasser, Abraham Silverman, and others." (p. 1118)

Mr. Brownell neglected to say that during the "3 months beginning in November of 1945," Mr. White and I were associates in the Treasury Department. If he had, then evidence that we had been "in frequent close personal contact" would not seem so conclusive.

I am not arguing the merits of this "evidence." My attorneys have made it quite clear to me, and I understand, that that is irrelevant at this juncture. I cite this state- [fol. 23] ment only to show the lengths to which the Attorney General is prepared to go to find support for Miss Bentley's charges.

If this were merely another criminal matter in which the prosecutor had staked his prestige on the outcome, an attitude like the Attorney General's would be serious enough. But particularly because of the sensational partisan furor touched off by Mr. Brownell's speech of November 6, 1953 and the violent political passions generated by the Jenner Committee hearings, Mr. Brownell is committed to his position not only because he is the Government's chief law officer, but also because he has been or has made himself the Administration's chief political spokesman on this subject.

I understand that a discussion of the political aspects of this case is irrelevant as such, but it is none the less pertinent to observe that, be I innocent or guilty, the Attorney General must now use me as a pawn in a game being played for the highest political stakes. If he is unable to have me convicted for espionage, he must try to have me convicted for perjury. Whether or not I have immunity against the former, it seems to me that this is a situation which calls for the application of the literal language of the Fifth Amendment. In other words, this is peculiarly a case where if I am ordered to answer questions, I shall be compelled to be a witness against myself. This is a case where, if the Court does have discretion, it should be exercised to protect a citizen from both of the undesirable alternatives which the Government seeks to impose on him.

As far as Mr. Hoover's testimony is concerned (pp. 1142-1150), it suffices to say that he was even more positive about Miss Bentley's charges than was Mr. Brownell. He too stated that "her testimony has been evaluated by juries and reviewed by the courts and has been found to be ac- [fol. 24] curate" (p. 1145). Such a statement can mean only that Mr. Hoover's unique and extraordinary prestige is also at stake in this matter.

My Appearance Before Grand Juries In Washington On October 25, 1954 And In This District On November 3 and November 8—I should say that before I was subpoenaed to appear before the Grand Jury in Washington, I knew from the press that such a Grand Jury as well as one in Camden, New Jersey, were taking testimony concerning Miss Bentley's charges. I mention this because the press stories relating to this development were particularly detailed and

circumstantial and stated openly or by clear implication that the information in the stories came from sources in the Justice Department (See, e.g., *The Washington Evening Star*, Sept. 15, 1954, p. 1, "*Drive Mapped Against Spies Of World War II*"; *The New York Times*, Sept. 17, 1954, p. 1, "*Grand Juries Get Spy Mop-Up Cases Under New Law*"). As the very title of the story in *The Times* shows, that story as well as the others gave particular emphasis to the new immunity law. Among other details, these stories mentioned my name as well as those of other persons.

Not unrelated to such press stories is the speech made by Assistant Attorney General William F. Tompkins, chief of the recently created Internal Security Division in the Department of Justice, to the Camden County Bar Association on September 28 (New Jersey Law Journal, October 7, p. 1) during the period the Grand Jury was sitting in Camden. In this speech, Mr. Tompkins said:

> "The Silvermaster-Perlo espionage groups which operated in war-time Washington were engaged in the worst kind of informing which can be imagined—that of divulging information of the United States to the Soviets." (p. 6).

[fol. 25] Like Messrs. Brownell and Hoover, Mr. Tompkins, who I assume is directly in charge of the presentation of the evidence in this matter to the current Grand Juries, has no hesitation in announcing my guilt, and no hesitation in doing so before a bar association while the Grand Juries are still sitting and in a city where one of the Grand Juries itself is in session.

When I appeared before the Grand Jury in Washington on October 25, I claimed my privilege under the Fifth Amendment. But I think this Court should know that two of the attorneys for the Justice Department, a Mr. Nicholson and Mr. Lafayette Broome, returned to one of the themes employed by the F.B.I. agents in their interrogation of me on April 15, 1947. This is the subject of my national and religious background and my German-American antecedents. Mr. Nicholson asked me to give the Grand Jury my religious affiliations. When I did not answer, he did say that I need not do so if I preferred. I said I

preferred not. Mr. Broome then asked me if I had *any* religious affiliations, but he also assured me that I need not answer and I did not. Mr. Broome also spoke at some length about the contributions made by the German-Americans in Missouri and appealed to my "sturdy" background for cooperation with the Government. The other themes employed by the F.B.I. in April, 1947 were also employed here, although not so blatantly. Had the stories about me distressed my father (who died in 1953)? My mother? My sister? Had I been threatened physically if I did answer questions? Had I suffered from the publicity I had received?

The Court may also be interested in the fact that on Thursday, October 21, The Washington Evening Star carried a story that I had been subpoenaed to appear before the Grand Jury the following Monday, October 25 [fol. 26] (p. A-34, "*Espionage Probers Subpoena Ullmann, Ex-Treasury Aide*"). This story reviewed Miss Bentley's charges and quoted from a Congressional committee report. It also stated that Justice Department "spokesmen" had confirmed an earlier story that, "armed with the new witness immunity law", "a fresh effort to obtain indictments in wartime espionage cases would be made by the department."

I have asked my attorneys if they can explain to me why I was subpoenaed before a Grand Jury in New York after I had already appeared before the one in Washington only the week before. They say they are unable to explain this, but they do say that the Government has the power to do so. I have asked them whether it is within the power of this Court to examine the transcript of my testimony before the Washington Grand Jury, and they say it is. If this is so I respectfully request that this Court do so before passing on the pending application.

Since the matter now before the Court grows out of my appearances before the Grand Jury in this Court on November 3 and November 8, it is unnecessary for me to comment thereon even if it were appropriate.[3]

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[3] I should also bring to the attention of the Court an Associated Press dispatch in the *New York Herald Tribune* for this past Sunday (November 14, 1st Section, p. 19)

Conclusion—As I said at the beginning of this affidavit, the foregoing facts show that an immunity order of this [fol. 27] Court will not give me one of the alternatives I should have, that of answering the questions in the negative. If the Court were to direct me to answer by an order of the kind for which the Government has applied, but if the basic questions relating to Miss Bentley's charges and only those questions were then put to me in the Grand Jury room, perhaps the attitude of Messrs. Brownell, Hoover and Tompkins (not to mention Senators Jenner and Mundt and their colleagues in the House and Senate) as to my guilt would have no special significance.

However, the foregoing facts, and what has happened in other cases, shows that these questions would only be the beginning. I might be asked again about this or that person who is or was employed at Forth Monmouth; I might be asked again about the matter of the occupation currency. A negative answer to the question relating to my alleged Communist Party membership, for example, would merely open the door, as the Remington and Lattimore cases illustrate particularly. What about the membership of Silvermaster, White, and the others? Did I contribute to this or that cause? What was my position on this or that question? In 1953? In 1945? In 1939? How often did I lunch with this person, how often did I visit with that one, and what did I say and what did they say? Do I read this, did I read that?

I do not wish to extend this affidavit by illustrations which could be multiplied a hundred-fold and which would all find precedent in the trials, the Congressional hearings,

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entitled "*Brownell Starts First Case Under Spy Immunity Law*". The dispatch is date-lined from Washington, November 13, and the story is attributed to "Justice Department officials". Although neither my name nor this Court is mentioned, the story obviously relates to this case. (The same dispatch, with minor and irrelevant editorial changes, also appeared on the same day in the *New York Times*.) The story refers to a Grand Jury in San Francisco as well as to those in Washington and Camden, but not to the one sitting in this Court.

the investigations, and the Oppenheimer and other "loyalty" cases of the period.

In view of these facts, I believe that an order directing me to testify will give the prosecutors a merciless trap with which to ensnare me.

[fol. 28] This is a case in which I believe that I am entitled to the full protection of the Fifth Amendment, immunity law or no immunity law.

William L. Ullmann.

(Sworn to November 17, 1954.)

In United States District Court

Affidavit of Edward L. Grampp, Dated December 1, 1954, in Support of Application.

City of Washington
District of Columbia, ss.:

Edward L. Grampp, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation.

2. I have been shown an affidavit of William Ludwig Ullmann, dated November 17, 1954, relating in part to an interview with Mr. Ullmann conducted by Special Agents of the Federal Bureau of Investigation on April 15, 1947.

3. I did not participate in the interview. However, shortly after 10:00 p.m., I was informed that the interview with Mr. Ullmann had been completed. I was asked to accompany Special Agent E. Hyatt Mossburg while he [fol. 29] drove Mr. Ullmann back to the latter's residence. I did so. Mr. Ullmann was driven to the residence at 5515 30th Street, N.W., in the District of Columbia, which he shared with Nathan Gregory Silvermaster and Helen Silvermaster. The trip was made without incident, and Mr. Ullmann left the automobile at approximately 10:35 or 10:40 p.m.

4. Mr. Ullmann was not told by either Special Agent

Mossburg or myself that we would see him in court, as he states in his affidavit.

Edward L. Grampp.

(Sworn to December 1, 1954.)

In United States District Court

Affidavit of Maurice A. Taylor, Dated December 1, 1954, in Support of Application.

City of Washington
District of Columbia, ss:

Maurice A. Taylor, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation.

2. I have been shown an affidavit of William Ludwig Ullmann, dated November 17, 1954, relating in part to an [fol. 30] interview with him conducted by Special Agents of the Federal Bureau of Investigation on April 15, 1947. My participation in and knowledge of that interview is hereafter described.

3. At 9:30 p.m. on April 15, 1947, I was in Room 1511 of the Washington Field Office of the Federal Bureau of Investigation, then located in the Department of Justice on Pennsylvania Avenue between 9th and 10th Streets, N.W., Washington, D.C., when Special Agent H. Hyatt Mossburg emerged from the adjoining room. He told me that he and Special Agent Wildman had completed their interview with Mr. Ullmann, and asked me if I wished to ask him any questions.

4. I entered the room where Special Agent Wildman and Mr. Ullmann were seated and talked with Mr. Ullmann for approximately twenty or twenty-five minutes, leaving shortly before 10:00 p.m. While I was interviewing Mr. Ullmann, the only other person in the room was Special Agent Wildman.

5. On page 7 of his affidavit, Mr. Ullmann makes certain allegations concerning the interview about which I should like to comment: Of course, my participation was confined

to the relatively brief period from shortly after 9:30 p.m. to shortly before 10:00 p.m. My personal knowledge is limited to what transpired during that period, and the following statements are intended to be so limited.

6. I have no recollection of using the word "lying" when questioning Mr. Ullmann, nor of hearing that word used. However, many of Mr. Ullmann's denials were contrary to information in our possession and were not believed. That fact was made known to him.

[fol. 31] 7. I have no recollection of using the word "red" in my questioning of Mr. Ullmann, nor of hearing that term used. The terms "Communist" or "Communist sympathizer" were used, however.

8. There was no statement made in my presence to the effect that were Mr. Ullmann's denials made in a "'red' country" his "arm would already have been broken." There was nothing said about an arm being broken.

9. In an effort to persuade Mr. Ullmann to cooperate with us and give us the benefit of knowledge which we had reason to believe he possessed, I referred to the fact that he came from a substantial, midwestern family and that he had deep roots in this country and attempted to appeal to a sense of family loyalty and to a sense of loyalty to his country. At no time was it suggested that anything might happen, or that we should "hate" to see anything happen, to his parents in Missouri or to his sister in New York. At no time was Mr. Ullmann told that he was "not foreign riff-raff that came over on a crummy boat a few days ago" or that he was not "a smelly foreigner." Such language was not used while I was present.

10. At no time while I was present, was anything said to Mr. Ullmann about his being able to earn "large sums from writings, movies, lecture tours, etc."

11. While I was present, the interview with Mr. Ullmann was carried on in normal, conversational tones. He was treated courteously. Certainly no threats were made. Although he appeared to be quite nervous, at no time did he protest his treatment or indicate a desire to leave.

Maurice A. Taylor.

(Sworn to December 1, 1954.)

AFFIDAVIT OF E. HYATT MOSSBURG, DATED DECEMBER 1, 1954, IN SUPPORT OF APPLICATION.

CITY OF WASHINGTON
District of Columbia, ss.:

E. Hyatt Mossburg, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation.

2. I have been shown an affidavit of William Ludwig Ullmann, dated November 17, 1954, relating in part to an interview with Mr. Ullmann conducted by Special Agents of the Federal Bureau of Investigation on April 15, 1947. My recollection of that interview is set forth herein.

3. At approximately 6:20 p.m. on April 15, 1947, Special Agent Lorenzo Wildman and I presented ourselves at the residence shared by Mr. Ullmann and Nathan Gregory Silvermaster and his wife Helen Silvermaster at 3515 30th Street, N.W., in Washington, D. C. We asked Mr. Ullmann to come with us to the Washington Field Office of the Federal Bureau of Investigation, then located in the Department of Justice on Pennsylvania Avenue between 9th and 10th Streets, N.W., in Washington, in order to discuss a matter of vital concern to the United States Government. Mr. Ullmann remarked that he hadn't eaten and we told him that we could have food brought to the office. He accompanied us, apparently willingly, to our automobile and we drove to the Department of Justice.

[fol. 33] 4. The interview was conducted in Room 1513 at the Department of Justice. It began at approximately 7:00 p. m. I was present until approximately 9:30 p. m. At that time, Special Agent Wildman and I had concluded our questioning of Mr. Ullmann and I stepped into an adjoining room. There I encountered Special Agent Maurice Taylor. As he had a wide familiarity with the entire case, I informed him that we were through with the interview and asked him if he'd like to question Mr. Ullmann further. Special Agent Taylor thereupon entered the room with Mr. Ullmann and Special Agent Wildman while I remained behind.

5. Special Agent Taylor came out of the interview room at approximately 10:00 p. m. I re-entered. Within a very few minutes, Mr. Ullmann and I left the office. While Special Agent Wildman remained behind, Special Agent Edward L. Grampp joined Mr. Ullmann and myself. We drove Mr. Ullmann back to his residence leaving him there at approximately 10:35 or 10:40 p. m.

6. From 7:00 p. m. until 9:30 p. m., the entire period of my participation in the interview, the only persons in the room with Mr. Ullmann were Special Agent Wildman and myself.

7. At the outset, Special Agent Wildman explained to Mr. Ullmann that he need not respond to our questions and that anything he might say could be used against him. The purpose of the interview was to seek information and to give Mr. Ullmann an opportunity to explain various information in our possession tending to indicate that he and others associated with him had engaged in espionage.

8. To my certain knowledge, we offered to send out for sandwiches and a beverage on at least two occasions. [fol. 34] Mr. Ullman's response was that he preferred to wait until he returned to his residence to eat. Water was available at all times in a decanter on the desk and was offered to him.

9. The interview was conducted in a conversational tone. No threats were made. Neither were loud voices nor threatening gestures used. The door leading from the room to the corridor was equipped with a lock which, when engaged prevented entry from the corridor, but the door could be opened from inside the room merely by turning the handle. Thus, from the position of one in the room, the door was not, and could not be, locked. The lock was engaged for the sole purpose of preventing interruptions. At no time was Mr. Ullmann prevented from leaving nor was he told that he could not leave. He appeared very nervous throughout the interview, but at no time did he express a desire to terminate the interview and depart.

10. The affidavit of Mr. Ullmann makes certain allegations to which I should like to address myself. The observations which I make hereafter are confined to those periods

of time when I was present, that is, the entire time except for the interval between the approximate times of 9:30 p. m. and 10:00 p. m.

11. On page 7 of his affidavit, Mr. Ullmann creates the impression that he was constantly accused of lying. If that is the impression he intends to convey, I wish to state that it is not true. I have no recollection of either Special Agent Wildman or myself using the words "lying" or "liar." There were certainly occasions during the course of the interview when Mr. Ullmann's denials were not believed. There were occasions when he was informed in so many words that there was reason to believe that certain things were true despite his denials.

[fol. 35] 12. I have no recollection of the term "red" being used, either with reference to associates of Mr. Ullmann or with reference to another country. The term is not one which I am in the habit of using when referring to Communist associations. Such terms as "Communist" and "Communist sympathizer" were employed in our questioning of Mr. Ullmann.

13. There was nothing said to the effect that were Mr. Ullmann's denials made in a "'red' country", his "arm would already have been broken." Nothing was said about an arm being broken, and no threats of any sort were made.

14. While I was present, nothing was said to the effect that we would "hate" to see anything happen to his parents or to his sister. If it is Mr. Ullmann's intention to imply that a veiled threat was made concerning the safety of his family, I wish to state categorically that no such threat was made, veiled or otherwise.

15. Language such as "foreign riff-raff that came over on a crummy boat a few years ago" and "smelly foreigner" was not employed while I was present.

16. No hope of reward in the form of "large sums from writings, movies, lecture tours, etc." was held out to Mr. Ullmann. Nothing was said even remotely resembling that statement.

17. As I stated above, Mr. Ullmann was driven to his residence at the conclusion of the interview by Special Agent Grampp and myself. He was not told by either

Agent Grampp or myself that we would see him in court, as he alleges.

E. Hyatt Mossburg

(Sworn to December 1, 1954.)

[fol. 36] In United States District Court, Southern District of New York

Appearances:

J. Edward Lumbard, United States Attorney, Attorney for United States of America, L. E. Broome, B. Franklin Taylor, John H. Davitt, Special Assistants to the Attorney General, Of Counsel.

Nathan Witt, 9 East 40th Street, New York 16, N. Y.
Leonard B. Boudin, 25 Broad Street, New York 4, N. Y.,
Attorneys for Respondent.

Opinion—February 8, 1955

Edward Weinfeld, D. J.

This is the first proceeding involving the immunity statute passed at the last session of the Congress.[1] The United States Attorney has presented to this Court an application for an order directing William Ludwig Ullman to answer before a grand jury questions which he has heretofore refused to answer, upon the assertion of his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. The application sets forth that the grand jury was inquiring into matters involving interference with and endangering of the national security and defense of the United States by espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere. [fol. 37] The petition further avers that in the judgment of the United States Attorney the testimony of the aforesaid William Ludwig Ullman is necessary in the public inter-

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[1] Public Law 600, 83rd Cong.; 68 Stat. 83; 18 U. S. C. § 3486.

est and that the application is made with the approval of the Attorney General, whose letter of approval is attached.

The statute in question provides a procedure in investigations and cases involving the national defense or security whereby a witness, having asserted his constitutional privilege against self incrimination, may be compelled to testify in return for immunity from future prosecution as to any matter concerning which his testimony is so compelled. The act provides for a grant of immunity in two separate and distinct categories, one, in investigations before the Congress or its authorized committees and, the other, in any proceeding or case before grand juries or courts of the United States. We are here concerned only with that part of the statute relating to witnesses before grand juries and courts. So far as pertinent, the statute provides:

. . . . . .

"(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987, violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of section 212(a) [fol. 38] (27), (28), (29) or 241(a) (6), (7) or 313(a) of the Immigration and Nationality Act (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the

ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted, or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court."[2]

The witness opposes the application upon various grounds. He urges that (1) the statute is unconstitutional and in contravention of his rights under the Fifth Amendment by requiring him "to be a witness against himself"; (2) the statute is invalid in that the grant of immunity is not sufficiently protective to compensate for his privilege against self-incrimination; (3) assuming arguendo the statute does grant full immunity, it is invalid in that the court is called upon to perform a non-judicial function; (4) further, assuming it is valid, the application fails to set forth facts establishing that it is in the public interest to grant immunity; (5) certain of the questions as to which the [fol. 39] application is made are improper even under a valid-immunity statute.

With respect to the first ground, the witness recognizing that the power of Congress to enact immunity statutes has been upheld in and since Brown v. Walker,[3] cites the dissenting opinions in that case and urges reconsideration in the light of the punitive sanctions and the social and economic consequences which follow self-exposure under a grant of immunity. The nub of his position is that the constitutional privilege against self-incrimination cannot be met by a statutory substitute no matter how broad the immunity. If Brown v. Walker is to be reconsidered and overruled, obviously that is to be done by the Supreme Court and not the District Court. In passing it may be noted that as recently as Smith v. United States similar

[2] 18 U. S. C. § 3486(c).

[3] 161 U. S. 591.

objections were advanced before the Supreme Court and rejected.[4] Moreover, immunity statutes have been before the Supreme Court in seven cases subsequent to Brown v. Walker.[5] Its authority remains unimpaired and its principle is firmly imbedded in our constitutional law.

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[4] 337 U. S. 137, 147 (1949).

[5] In Jack v. Kansas, 199 U. S. 372 (1905) the Court held that possible incrimination under federal law was no objection to a state immunity statute.

In Heike v. United States, 227 U. S. 131 (1913) the Court held that the immunity did not extend to matters concerning which the witness could have been compelled to testify without an immunity statute, such as the production and identification of corporate records.

United States v. Monia, 317 U. S. 424 (1943) held that under the Act of 1893, a witness acquired immunity simply by virtue of his appearance and testimony in obedience to a subpoena, and that it was not necessary for him to claim his privilege against self-incrimination before answering questions.

Feldman v. United States, 322 U. S. 487 (1944) held that the Fifth Amendment does not forbid the use in a federal criminal case of self-incriminating testimony compelled by state authorities under a state immunity statute.

In Shapiro v. United States, 335 U. S. 1 (1948), the Court held that no privilege attached to records required to be kept under the emergency price control act, and that a witness did not acquire immunity by appearing in response to a subpoena and testifying as to such records, even though he claimed privilege before answering the questions.

In Smith v. United States, 337 U. S. 137 (1949), the Court held that a witness who appeared in response to a subpoena and, after having claimed his privilege, answered all questions asked of him, was immune from prosecution under an indictment involving transactions, matters and things concerning which he testified.

Adams v. Maryland, 347 U. S. 179 (1954) held that 18 U. S. C. 3486, before amendment by the instant act, barred the use in a state prosecution of testimony previously compelled before a congressional committee.

[fol. 40] Immunity statutes have a long history as a means of forcing out evidence necessary to law enforcement which absent such legislation cannot be compelled where a witness asserts his privilege against self-incrimination.[6] The constitutional elements necessary to the validity of an immunity statute are clear. While Congress has the power to enact legislation to compel a witness to answer incriminating questions upon a grant of immunity, the immunity tendered must provide a full and complete substitute for the privilege against self-incrimination.[7] The constitutional equivalent of the privilege must be absolute immunity from prosecution for any criminal offense arising out of the compelled testimony.[8] The witness urges that the present statute is invalid in failing to meet these tests. Thus a basic question is whether the protection afforded by the statute is co-extensive with the constitutional privilege.

[fol. 41] The witness' primary contention here is that the statute fails to give complete immunity because it leaves him subject to prosecution for state crime. He argues (1) that Congress is without the constitutional power to bar state prosecutions, and (2) assuming such power, the statute literally read only prohibits the use of testimony in a state prosecution but does not immunize the witness against prosecution in any state court so long as the testimony itself is not used.

The short answer to both contentions is Murdock v. United States.[9] There the Supreme Court held that the privilege against self-incrimination could not be invoked before a federal tribunal where the incrimination feared was under state law. If the privilege does not extend to possible crimination under state law and the immunity need only be as broad as the privilege, then it is not an objection to the statute that it does not protect the witness from possible state prosecution.[10] While the Murdock case, what-

[6] See Shapiro v. United States, 335 U. S. 1, 6, fn. 4.
[7] Counselman v. Hitchock, 142 U. S. 547.
[8] Brown v. Walker, 161 U. S. 591.
[9] 284 U. S. 141.
[10] Feldman v. United States, 322 U. S. 487; Jack v. Kansas, 199 U. S. 372.

ever objections may be raised to its rule,[11] is a sufficient answer to the witness' contention as long as its authority remains unimpaired, I am of the view that Congress has the constitutional power, certainly with respect to matters touching upon the national defense or security, to provide for a grant of immunity in exchange for compelled testimony which is broad enough to prohibit state prosecutions.

The power to provide for the common defense of the United States is, under the Constitution, expressly granted [fol. 42] to the Congress.[12] A "necessary and proper"[13] incident of that power is authority to enact legislation to secure evidence from those allegedly possessing knowledge of actions aimed at undermining the security of the government and to protect it against its enemies, domestic or foreign. By their very nature crimes of subversion, treason, espionage and the like, and conspiracies to commit such crimes, are aimed generally at the federal government, representing the totality of the forty-eight states. While such criminal pursuits may also have their impact upon individual states, Congress, since they are matters of paramount national concern, may in passing laws to deal with them occlude the field. Conceding the right of a state, absent federal action, to protect itself against seditious and like activity,[14] if Congress enacting legislation essential to the national defense or security, determines that immunity granted to a witness on the basis of his compelled testimony shall also extend to state prosecutions, it is within its power to do so. Such congressional legislation under the Constitution is then "the supreme law of the

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[11] United States v. Marcello, 5 Cir., 196 F. 2d 437; United States v. DeCarlo, 102 F. Supp. 597; see also Ballman v. Fagan, 200 U. S. 184; United States v. Saline Bank of Virginia, 1 Pet. 100.

[12] United States Constitution, Art. I, § 8, cl. 1.

[13] United States Constitution, Art. I, § 8, cl. 18.

[14] Gilbert v. Minnesota, 254 U. S. 325; Gitlow v. New York, 260 U. S. 703. These cases were decided prior to the enactment of the Smith Act, 18 U. S. C. § 2385.

land" and state interests must yield to the paramount national concern.[15]

The immunity provided under the act and the intended correlative bar to state prosecution go no further than necessary to effectuate the legitimate congressional purpose. It cannot be said that the means are not "appropriate" and [fol. 431] "plainly adapted to that end."[16] The act does not cover inquiries into all crime. Its stated purpose is to secure evidence of federal crimes affecting the national defense or security by means of an effective grant of immunity. It is specifically restricted to offenses involving treason, sabotage, espionage, sedition, and conspiracy to commit any of the foregoing; it also encompasses violations of the Internal Security Act, the Atomic Energy Act, and the Immigration and Nationality Act. Viewed against its objective, the statute is a necessary and proper incident of Congress' power to protect the national interest against the foregoing offenses and hence is "the supreme law of the land."

Recently in Adams v. Maryland the Supreme Court held that the predecessor section of the present act (former 18 U.S.C. § 3486) prohibited the use in state courts of testimony given before a congressional committee. The State of Maryland which had obtained a conviction against Adams by use of his testimony before a congressional committee, argued that Congress was without power to bar the use of such testimony in state courts. This contention was rejected. The Court also held that former § 3486 was a legitimate exercise of the congressional power "necessary and proper" to carry out its legislative function and was binding upon the states as "the supreme law of the land." While the Adams case only dealt with federal immunity as a bar to the use of testimony in the state courts as distinguished from a bar to state prosecutions, its rationale

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[15] United States Constitution, Art. VI, cl. 2; Brown v. Walker, 161 U. S. 591, 606; Hines v. Davidowitz, 312 U. S. 53.

[16] McCullough v. Maryland, 4 Wheat. 316, 421; Adams v. Maryland, 346 U. S. 179, 183.

would seem to apply to both situations.[17] And since the [fol. 44] Supreme Court has held that Congress has the power to pre-empt the field of alien registration[18] against a state law requiring alien registration and intended to meet seditious and like activities, it is hard to see why the prosecution of offenses undermining the national defense or security may not also be an exclusively federal concern.

The witness however contends, that assuming congressional power exists, the statute fails to grant immunity from state prosecutions. He argues that the phrase "in any court" refers only to the use of evidence but does not bar state prosecution. The language of the present immunity statute is as broad and plain as words can express, and indeed, is more comprehensive than the immunity statute upheld in Brown v. Walker as affording the witness protection coextensive with his privilege. Thus it provides that not only is the witness immune from prosecution with respect to any matter as to which he is forced to testify, but also that the testimony so compelled may not be "used as evidence in any criminal proceeding * * * against him in any court." While it is true that the phrase "in any court" does not appear in the clause barring prosecutions based upon compelled evidence, the language of the clause dealing with prosecutions is by itself broad enough to encompass state as well as federal prosecution.[19] The congressional purpose to extend immunity to state prosecutions [fol. 45] was expressly stated by the House Committee.[20]

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[17] The Attorney General asserted that Congress had the power to extend the immunity granted in exchange for testimony to include state court proceedings. Hearings before Committee on the Judiciary on H. R. 6899, 83rd Cong., 2nd Sess., June 8, 1954, p. 42; Report of Committee of Assn. of the Bar of the City of New York on Immunity Bills, July 7, 1954, pp. 10-11; Commonwealth v. Nelson, 377 Pa. 58, 104 A. 2d 133, cert. granted sub nom. Pennsylvania v. Nelson, 348 U. S. 814.

[18] Hines v. Davidowitz, 312 U. S. 53.

[19] Cf. Brown v. Walker, 161 U. S. 591, 608.

[20] "The language of the amendment that 'no such witness shall be prosecuted or subjected to any penalty or forfeiture

At the time the Congress passed the bill it was aware of the decision in Adams v. Maryland and intended to afford a witness the fullest protection by enlarging the scope of immunity to bar state prosecutions as well as the use of evidence in state courts concerning any matter as to which his testimony has been compelled.

The witness next urges that the act is unconstitutional in that it requires the court to perform a non-judicial function. Here he contends that the court is called upon to approve the application for the grant of immunity—in effect to exercise a veto power over the determination of the United States Attorney that the public interest requires that immunity be granted to the witness. Thus he urges that the ultimate determination of whether immunity should be granted to a witness who has asserted his privilege rests with the court, thereby requiring it to exercise a power that is exclusively either legislative or executive; that for the court to make such determination does violence to the separation of powers concept and intrudes the court into matters which call for policy rather than judicial decisions.

[fol. 46] In my view it is unnecessary to pass upon the issue of whether or not a power in the court to approve a grant of immunity offends constitutional limitations. Section (c), which we are considering, is clear and unambiguous on its face. It contains no language, either express or implied, which vests discretionary power in the court to

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for or on account of any transaction, matter, or thing concerning which he is so compelled to testify, after having claimed his privilege against self-incrimination, to testify or produce evidence', is sufficiently broad to ban a subsequent State prosecution if it be determined that the Congress has the constitutional power to do so. In addition, the amendment recommended provides the additional protection—as set forth in the Adams case, by outlawing the subsequent use of the compelled testimony in any criminal proceeding—State or Federal.

"By the use of these two distinct concepts, the committee believes that the fullest protection that can be afforded the witness will be achieved." Committee on the Judiciary, H.R. Rep. No. 2606, 83rd Cong., 2nd Sess. (August 3, 1954), p. 7.

uphold or overrule the judgment of the United States Attorney, as approved by the Attorney General, that the testimony of a witness is necessary to the public interest and warrants the grant of immunity to secure it. Indeed a reference to sections (a) and (b) of the act dealing with the method whereby immunity may be granted to witnesses appearing before the Congress or its committees negates the contention advanced by the witness. These sections relating to congressional investigations provide that the testimony of a witness may be compelled upon the assertion of his constitutional privilege when (1) in proceedings before one of the houses of Congress a majority of the members present of that house, or (2) in proceedings before a committee, two-thirds of the full committee have voted for the grant of immunity; (3) and an order of the United States District Court wherein the inquiry is being carried on has been entered requiring the witness to testify or produce evidence.

Significantly, it is further provided "such an order *may* be issued by the United States District Judge" and that neither House nor any of their Committees shall grant immunity to any witness "without first having notified the Attorney General of the United States of such action and having secured the *approval* of the United States District Court in the district wherein such inquiries are being held" (emphasis supplied). The language in these sections of the act purports to vest discretion in the court and specifically requires its approval of any grant of immunity. The subsequent section (c) pertaining to proceedings before a [fol. 47] grand jury or cases before a District Court contains no such reference to the court's function or restriction upon the grant of immunity. The only reference to the court is markedly different from that contained in the sections dealing with congressional investigations. In the instance of grand jury or court proceedings involving national defense or security it must appear (1) that in the judgment of the United States Attorney the testimony of a witness regarding such matters is necessary to the public interest; (2) that the Attorney General has approved the application by the United States Attorney.

The section then provides that upon application "to the

court that the witness shall be instructed to testify or produce evidence subject to the provisions of that section, and upon order of the court such witness shall not be excused from testifying or producing books, papers or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture." Thus the only approval required under section (c) is that of the Attorney General in support of the application of the United States Attorney.

Certainly it is logical to assume that had the Congress intended, with respect to grand jury and court proceedings, to vest the same discretion and power of approval in the court as in the instance of congressional investigations it would have used the very language employed in the section dealing with congressional committees.

Absent a statute granting absolute immunity to a witness who has validly asserted his privilege against self-incrimination the courts are without power to compel him to answer. When an order is sought to force a witness to testify in exchange for immunity against prosecution authorized by statute, he is entitled to advance before the court any other [fol. 48] ground, legal or constitutional, for continued refusal to answer. And only when it appears that full and absolute immunity has been substituted for his constitutional right against self-incrimination, and no other legal barrier exists, may he be compelled to answer.[21]

In the present statute the court is empowered to order the witness to answer whenever it appears that the conditions of the grant of immunity, as specified in the statute and as outlined above, exist. Thus the court must be satisfied that (1) the grand jury or court proceeding relates to investigations in cases involving matters enumerated in section (c); (2) the United States Attorney certifies with respect to such matters it is necessary in the public interest that the testimony of the witness who has claimed his privilege be obtained in exchange for a grant of immunity; (3) the Attorney General approves the application; (4) no other legal objection exists to the compulsion of the witness' testimony. Thus the order of the court gives assurance

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[21] Smith v. United States, 337 U. S. 137, 150.

(a) that all conditions have been complied with before the immunity is granted to the witness—that the immunity power is not frittered away in cases not within the framework of the congressional intent; and (b) that the witness is protected against subsequent prosecution or the use of evidence with respect to matters as to which his testimony has been compelled by a determination that an effective grant of immunity has been made. The immunity takes effect when the court finds that all the prerequisite conditions have been met and the witness has answered the questions as to which he previously asserted the privilege.

I conclude that the statute, by the phrase "upon order of the court" in section (c) refers to the court's function in determining that the application complies with the require-[fol. 49] ments specified in that section before the witness may be ordered to answer. And this is clearly a judicial function.[22]

But even if ambiguity could be wrung from the statutory language, the witness' contention that the legislative history shows a clear and inescapable congressional purpose to require court approval of each grant of immunity is without force. While the contention may be true of immunity grants by Congress, about which attention was primarily centered, the history shows no such intent as to the section dealing with witnesses before courts and grand juries.

The witness places great reliance on a portion of the report of the House Committee on the Judiciary[23] which states: "In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill."[24] The witness insists that the

[22] See Interstate Commerce Commission v. Brimson, 154 U. S. 447.

[23] This committee substituted its own version for both the bill as it passed the Senate and various bills introduced in the House. Committee on the Judiciary, H.R. Rep. No. 2606, 83rd Cong., 2d Sess., August 3, 1954, p. 3.

[24] Id. at 8.

only possible "independent" parties in cases before courts and grand juries are the Attorney General and the court. But this view ignores the significance of the phrase "interested parties"—an utterly inappropriate description of a court determining a controversy between contending parties. Since the United States Attorney and the Attorney General are to form their judgments separately,[25] the phrase "independent but interested parties" would seem to fit them better than the court.

[fol. 50] Moreover, the context of the paragraph refutes the witness' interpretation. After explaining that the procedure necessary to grant immunity before a congressional committee avoids the danger of "immunity baths," the report states that similar precautions exist in cases before courts and grand juries. The explanation continues that if the United States Attorney decides in an authorized matter the public interest requires that immunity be granted to a witness who has asserted his privilege, the prosecutor "must first obtain the approval of the Attorney General for such grant and then apply to the court for the *necessary instruction* to the witness to testify or produce evidence. All conditions must be complied with before the grant of immunity can be given to the witness" (emphasis supplied). This language hardly supports the view that the court is to exercise a discretionary function or a veto power as to whether the testimony of the witness is required in the public interest. The "necessary instruction" to the witness appears to refer to the usual direction or instruction issued by a court whenever a witness refuses, without legal justification, to answer questions before a grand jury or court. This instruction or order issued only after the witness has been afforded an opportunity to advance his objections, forms the basis of subsequent proceedings for failure to comply. Moreover, the two references in the Committee's report to section (c)[26] specifically mention approval by the Attorney General and omit any mention whatsoever of court approval or discretion. Thus the Committee's summary of section (c) parallels the statutory language. Fi-

[25] Id. at 9.

[26] Id. at 8, 9.

narily, it is not without significance that the Committee's explanation concludes with the statement "All conditions must be complied with before the grant of immunity can be given to the witness."

[fol. 51] The witness also relies on statements made during the House debates by Representative Keating, a member of the Judiciary Committee, and one of the bills' leading proponents on the House floor, which tend to support his construction.[27] Whatever force these remarks may have,[28] is, however, undermined by the statement of another member of the House Judiciary Committee, Representative Walter, who took a quite different view.[29] In view of the fact that the bill's leading proponents differed as to the role assigned to the courts, and that the Committee report supports the government's view at least as strongly as the witness', the scanty legislative history is far from conclusive. It contains fully as much ambiguity as the witness professes to find in the statute.

But the witness insists that the rejection by the House Committee of Representative Keating's bill which made no provision for court review of immunity grants requires acceptance of his interpretation. This argument fails to take into account the numerous substantial alterations which lead the Committee to draft its own bill as a sub-

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[27] The bill passed the Senate without debate on the motion of Senator McCarran who paraphrased the report of the House Committee on the Judiciary. While saying that the sections dealing with proceedings before Congressional committees and those before courts and grand juries contained "similar provisions" he made no attempt to define the court's role in the latter group. 100 Cong. Rec. 13310 (Aug. 11, 1954).

[28] Whether or not statements made during general debate by individual members of the reporting committee are sufficient to show a congressional intent may be open to question. See Jackson, J., concurring in Schwegmann Brothers v. Calvert Distilleries Corp., 341 U. S. 384, 395; Note, a Re-evaluation of the Use of Legislative History in the Federal Courts, 52 Col. L. Rev. 125.

[29] 100 Cong. Rec. 12604 (August 4, 1954).

stitute not only for Mr. Keating's proposal but also for [fol. 52] a bill which had passed the Senate.[30] One fundamental change was the insertion of judicial review of legislative grants of immunity in connection with legislative investigations. This provision was apparently inserted to resolve the dispute over whether Congress or the Attorney General should have the ultimate responsibility in granting immunity to witnesses before congressional committees—a problem entirely absent where the witness testifies before a court or grand jury. An entirely new and basic provision in the Committee bill was the restriction of the statute's scope to matters involving national security. In this connection the Committee bill provided a judicial check to insure that immunity was not granted in situations outside the statute's narrowed compass.[31] In view of the several possible explanations for the substitution of the Committee bill for Representative Keating's proposal, and others, the mere fact of substitution adds nothing to the clear words of the statute.

The most that can be said for the legislative history is that it is on the whole inconclusive. Certainly, it contains nothing that requires the court to reject the construction which the statutory language clearly requires. Especially is this so where the construction contended for purports to raise a serious constitutional question as to the rôle of the judiciary under the doctrine of separation of powers. The Supreme Court has repeatedly warned "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [fol. 53] question may be avoided."[32] Indeed, the Court has stated that words may be strained "in the candid serv-

[30] Committee on the Judiciary, H.R. Rep. No. 2606, 83rd Cong., 2nd Sess., August 3, 1954, pp. 3-4.

[31] This seems to have been the purport of Mr. Walter's remarks. 100 Cong. Rec. 12604 (August 4, 1954).

[32] Crowell v. Benson, 285 U. S. 22, 62; United States v. Rumely, 345 U. S. 41, 45; United States v. CIO, 335 U. S. 106, Brandeis, J., concurring in Ashwander v. TVA, 297 U. S. 288, 341, 348, and cases cited

ice of avoiding a serious constitutional doubt."[33] Here there is no need to strain words. It requires neither torturing of language nor disregard of a clear legislative policy[34] to avoid the constitutional question advanced by the witness. Indeed, to reach the constitutional issue would require straining of language. In such circumstances the court's duty is plainly to avoid the constitutional question.

Since the statute does not vest power in the court to review the determination of the United States Attorney as concurred in by the Attorney General, the witness' further argument that the court should, upon the facts, overrule the judgment of the United States Attorney that it is in the public interest that immunity be granted necessarily falls.

Finally, the defendant contends that regardless of the validity of the statute, some of the questions as to which the application is made are immaterial to the matter under investigation and further, that they infringe his rights under the First Amendment to the Constitution of the United States. As to the first objection, since the questions appear to come within the framework of an inquiry into national defense or security, the witness "is not entitled to urge objections of incompetency and immateriality, such as a party might raise, for this is no concern of his."[35] [fol. 54] The witness' second objection, that questions relating to membership in the Communist Party of himself and others violate his rights under the First Amendment is equally untenable. Any question on this score is concluded by Josephson v. United States, where the power of Congress to inquire into membership in the Communist

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[33] United States v. Rumely, 345 U. S. 41, 47.

[34] Cf. Shapiro v. United States, 335 U. S. 1, 31.

[35] Blair v. United States, 250 U. S. 273, 282; Nelson v. United States, 201 U.S. 91, 115; United States v. McGovern, 2 Cir. 60 F. 2d 880, 888-889; Application of Radio Corp. of America, SDNY, 13 FRD 167, 170. But cf. Green v. United States, 2 Cir., 193 F. 2d 111, 113.

Moreover, the questions to which the witness objects appear to be material to the subject matter under inquiry. United States v. Flynn, 2 Cir., 216 F. 2d 354, 360.

Party was upheld against a similar objection.[38] If Congress possesses such power it would appear that a grand jury engaged in an inquiry to determine whether a crime has been committed possesses no less power to inquire into the same subject matter.

Accordingly, the application to instruct the witness to answer the questions propounded to him before the grand jury and to testify and produce evidence with respect to matters under inquiry before said grand jury is granted.

Since the application contains the detailed questions before the grant jury, in order to preserve the secrecy of the grand jury proceedings the file papers shall be sealed subject to further order of the Court.

Settle order on notice.

January 31, 1955.

(S.) Edward Weinfeld, United States District Judge.

[fol. 55] In United States District Court

Order Requiring William Ludwig Ullmann to Appear and Testify Before Grand Jury—February 8, 1955

J. Edward Lumbard, United States Attorney for the Southern District of New York; having on the 10th day of November, 1954, made an application, orally and in writing, upon notice, to William Ludwig Ullmann, a witness, appearing before a Grand Jury of the Southern District of New York then inquiring into matters involving espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere, for an order instructing said William Ludwig Ullmann to testify and produce evidence before said Grand Jury pursuant to the provisions of Title 18, United States Code, Section 3486, as amended; and said application having duly come on to be heard before this Court on the 10th day of November, 1954.

Now, on reading the written application of J. Edward

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[38] Josephson v. United States, 2 Cir., 165 F. 2d 82. Accord: Barsky v. United States, D. C. Cir., 167 F. 2d 241; Lawson v. United States, D. C. Cir., 176 F. 2d 49.

Lumbard, Esq., the United States Attorney in and for the Southern District of New York, the approval of the Attorney General of the United States, dated November 5, 1954, to said application, the affidavit of J. Edward Lumbard, duly sworn to the 18th day of November, 1954, and the affidavits of E. Hyatt Mossburg; Maurice A. Taylor and Edward L. Grampp, duly sworn to the 1st day of December, 1954, all submitted in support of said application; the affidavit of William Ludwig Ullmann, duly sworn to the 17th day of November, 1954 in opposition to said application; and after hearing J. Edward Lumbard, Esq., United [fol. 56] States attorney for the Southern District of New York; (L. E. Broome and B. Franklin Taylor, Esqs., Special Assistants to the Attorney General, of counsel) in support of said application, and Nathan Witt, Esq., and Leonard B. Boudin, Esq., attorneys for William Ludwig Ullmann, the witness, in opposition thereto; and due deliberation having been had thereon; and the Court having filed its opinion on February 1, 1955; and it appearing as follows:

(1) William Ludwig Ullmann was subpoenaed to appear and did appear on the 3rd day of November, 1954, before a Grand Jury of the Southern District of New York;

(2) The Grand Jury was then and there inquiring into matters involving espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere;

(3) William Ludwig Ullmann refused to answer certain questions relating to matters under inquiry before said Grand Jury and specifically set forth in the aforesaid application on the ground that his answers might tend to incriminate him;

(4) In the judgment of the United States Attorney the testimony of the said witness concerning the aforesaid matters is necessary to the public interest of the United States; and

(5) Said application for an order that the witness shall be instructed to testify or produce evidence subject to the provisions of Title 18, United States Code Section 3486, as amended, was made with the approval of the Attorney General of the United States;

it is

[fol. 57] Ordered, that William Ludwig Ullmann appear as a witness before said Grand Jury at Room 1401 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on February 15, 1955 at 10:30 o'clock in the forenoon; and it is further

Ordered, subject to the provisions of Title 18, United States Code, Sections 3486, as amended, that William Ludwig Ullmann be and he hereby is instructed to answer the questions propounded to him before the Grand Jury and to testify and produce evidence with respect to such matters under inquiry before said Grand Jury; and it is further

Ordered, that the papers filed herein shall be sealed subject to the further order of the United States District Court for the Southern District of New York or any Judge thereof.

Dated New York, N. Y., February 8, 1955.

Edward Weinfeld, United States District Judge.

[fol. 58] In United States District Court, Southern District of New York

M. 11-188

In the Matter of William Ludwig Ullmann, a Witness Before the November, 1954, Grand Jury

Before Hon. Thomas F. Murphy, District Judge

Hearing of March 8, 1955

Appearances:

J. Edward Lumbard, Esq., United States Attorney, Attorney for the United States of America; By B. Franklin Taylor, Esq., Special Assistant to the Attorney General.

Victor Rabinowitz, Esq., Attorney for the Witness.

The Court: Where is the witness?

Mr. Rabinowitz: He is right here, sir (indicating).

Mr. Taylor: Your Honor, this morning the defendant, Mr. Ullmann, appeared before the Grand Jury. The ladies and gentlemen constituting that Grand Jury are sitting on my left. He appeared in response to an order issued by District Judge Weinfeld. That order was issued following an application by the United States Attorney, which [fol. 59] application was made pursuant to the new Immunity Statute, Title 18, section 3486, as amended.

Perhaps I better read the entire order.

(Reading) United States District Court, Southern District of New York.

In re: William Ludwig Ullmann.

Order.

J. Edward Lumbard, United States Attorney, for the Southern District of New York, having on the tenth day of November, 1954, made an application orally and in writing, upon notice to William Ludwig Ullmann, a witness appearing before the Grand Jury of the Southern District of New York, then inquiring into matters involving espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere, for an order instructing the said William Ludwig Ullmann to testify and produce evidence before said Grand Jury pursuant to the provisions of Title 18, United States Code, section 3486, as amended, and said application having duly come on to be heard before this Court on the tenth day of November, 1954.

Now, on reading the written application of J. Edward Lumbard, Esq., United States Attorney in and for the Southern District of New York, the approval of the Attorney General of the United States, dated November 5, 1954 to said application; the affidavit of J. Edward Lumbard, duly sworn to the 18th day of November, 1954; and the affidavits of E. Hyatt Mossburg, Maurice A. Taylor and Edward L. Grampp, duly sworn to the 1st day of November, 1954, all submitted in support of said application; the affidavit of William Ludwig Ullmann, duly sworn to the 17th day of November, 1954, in opposition to said application; after hearing J. Edward Lumbard, Esq., [fol. 60] United States Attorney for the Southern District

of New York, L. E. Broome and B. Franklin Taylor, Special Assistants to the Attorney General of Counsel, in support of said application; and Nathan Witt, Esq., and Leonard B. Bondin, Esq., attorneys for William Ludwig Ullmann, the witness, in opposition thereto; and due deliberation having been had thereon, and the Court having filed its opinion on February 1, 1955, and it appearing as follows:

1. William Ludwig Ullmann was subpoenaed to appear and did appear on the 3d day of November, 1954 before a Grand Jury of the Southern District of New York.

2. The Grand Jury was then and there inquiring into matters involving espionage and conspiracy to commit espionage in time of war or in the Southern District of New York and elsewhere;

3. William Ludwig Ullmann refused to answer certain questions relating to matters under inquiry of the aforesaid Grand Jury and specifically set forth in the aforesaid application on the ground that his answers might tend to incriminate him;

4. In the judgment of the United States Attorney, the testimony of the aforesaid witness on the aforesaid matters is necessary to the public interests of the United States; and

5. Said application for an order that the witness shall be instructed to testify or produce evidence subject to the provisions of Title 18, United States Code, section 3486 as amended, was made with the approval of the Attorney General of the United States;

It is ordered that William Ludwig Ullmann appear as a witness before said Grand Jury at Room 1401 in the [fol. 61] United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on February 15, 1955, at 10:30 o'clock in the forenoon;

And it is further ordered, subject to the provisions of Title 18, United States Code, section 3486 as amended, that William Ludwig Ullmann be and he hereby is instructed to answer the questions propounded to him before the Grand Jury and to testify and produce evidence with respect to such matters under inquiry before said Grand Jury.

And it is further ordered that the papers filed herein shall be sealed subject to the further order of the United States District Court for the Southern District of New York or any Judge thereof.

Dated: New York, N. Y., February 8, 1955. Edward Weinfeld, United States District Judge.

This order was appealed from and the appeal was dismissed by the Court of Appeals a week ago last Thursday on the ground that it was not an appeal from a final decision.

Consequently, the bringing of Mr. Ullmann before the Grand Jury was delayed until this time. He did appear this morning. He was asked the questions which he had refused to answer on November 3, 1954. He was also asked a few additional questions. He again, despite the knowledge of this order, refused to answer those questions or to give testimony as to those matters as to which he had previously invoked his privilege.

Counsel for Mr. Ullmann had informed us in advance of Mr. Ullmann's intention to refuse to obey the order. His concern is that the statute has not been construed by the Appellate Courts and there has been no determination of its constitutionality.

[fol. 62] Counsel for Mr. Ullmann agreed to waive the necessity for a notice as provided by Rule 42(b) of the Rules of Criminal Procedure. And I believe he will stipulate to that effect.

Mr. Rabinowitz: Yes. I waive any notice that may be required by either the Rules or any other provision of law, so that this matter may be quickly heard.

Mr. Taylor: We are prepared to put the stenographer who took the minutes this morning on the stand and to introduce into evidence what transpired before the Grand Jury today, as to the fact of the asking of the questions and the refusal to answer, and to institute contempt proceedings at this time, if it meets with your Honor's approval.

Mr. Rabinowitz: If it is satisfactory, I would be perfectly willing to waive the reading of the minutes as well, your Honor.

The Court: Would you stipulate that you refuse to an-

swer the same questions that Judge Weinfeld ordered him to answer?

Mr. Rabinowitz: Yes, sir, and that the reason given for his refusal was that he feared the answers might incriminate him and he pleaded his privilege under the Fifth Amendment of the Constitution.

The Court: There would not be any need to read them, I guess.

Are you willing now to proceed with the contempt proceedings as if all notices were given?

Mr. Rabinowitz: Yes. As perhaps was implied in Mr. Taylor's presentation, our primary concern here is to secure an appeal—to secure a decision on this matter from the Appellate Courts as rapidly as possible. We have no [fol. 63] desire to delay the matter or to rely on any technical matters here.

We did attempt to appeal before, but the Court held, apparently, that a contempt finding is necessary before an appeal will be heard. Therefore, we have agreed to expedite this matter so that we may make the necessary record for the Court of Appeals. I am prepared to proceed on that basis.

I do not know whether it would be appropriate for me to re-argue the matter before Judge Weinfeld. The matter, of course, was briefed and argued fully before Judge Weinfeld, and he has submitted an order. The grounds of the opposition which we urge are summarized by Judge Weinfeld.

The Court: I read the opinion.

Mr. Rabinowitz: I assume it won't be necessary for me to re-argue the matter, but merely to state for the record that we reassert all of the grounds we urged before Judge Weinfeld in opposition to the statute, in support of our contention that the statute was unconstitutional. We will rest on that and proceed on that basis in the Appellate Courts.

The Court: The only thing left for me then is to make a finding of contempt.

Mr. Taylor: Yes. It is our position that Mr. Ullmann appeared pursuant to a valid order of the District Court this morning and refused to obey that order.

The Court: I hold the witness, Mr. Ullmann, in contempt and sentence him to six months.

Mr. Rabinowitz: Now, your Honor, may I request, first, that your order provide that he be given an opportunity to purge himself. The Government, as I undersand it, is [fol. 64] primarily interested in getting his testimony and not in imprisoning him, and further, in order to make an appeal possible under the circumstances, we would request that provision.

The Court: Yes.

Mr. Rabinowitz: May I further request that your Honor stay the application of execution of this order pending our appeal to the Court of Appeals?

The Court: No, I do not think so. Let the Court of Appeals do that, if they wish, but my order is that he be put into the custody of the United States Marshal.

Mr. Rabinowitz: Now, may I request that your Honor postpone execution of this order for just a few days, so that I can make an application to the Court of Appeals for a stay?

The Court: You can make an application today.

Mr. Rabinowitz: I can, if the order is entered immediately. I have to file a notice of appeal and there is a mechanical problem of typing the papers, and so forth.

I have already spoken to the Clerk of the Court of Appeals. I anticipate, of course, that this would arise. He advises me that I can make application for a stay to be heard by a Judge, I suppose, this afternoon. I do not know whether he would have authority to grant a stay or not.

The Court: I would think so. You can make an application to one Circuit Court Judge.

Mr. Rabinowitz: Yes, but I would have to draw papers for that. As I say, the order has not even been entered so that I cannot even take an appeal at the moment. I would be perfectly willing to make my application tomor- [fol. 65] row, if your Honor would just stay execution until tomorrow. There is really no necessity to incarcerate the defendant. This is an effort to proceed, to get an adjudication in good faith on it.

The Court: Yes, but for factual purposes, my order is final. It is not only for the sake of making a test case——

Mr. Rabinowitz: I recognize that, sir. It is just that there are purely mechanical matters, and as I say, I cannot even file a notice of appeal until an order has been signed. Then I would have to draw motion papers and supporting affidavit.

The Court: No; you could apply to the individual Judge, orally, as I understand the Rule.

Mr. Rabinowitz: Even before a notice of appeal?

The Court: No, the notice of appeal is filed, but you can do that while the man is sitting inside. It is done every day in connection with convictions after trial.

Mr. Rabinowitz: Has the United States Attorney an order ready for signature?

The Court: As to a commitment, it will not take Mr. Sweeney too long to do it. How long will it take?

The Clerk: If they want us to draw it, a few minutes. They might want to draw a judgment of their own. If they want us to draw it, about five minutes.

Mr. Rabinowitz: Do you want an order?

Mr. Taylor: It is suggested by Mr. Bailey, Assistant United States Attorney, that the Government might ask that the surrender time be 4 P.M., which would allow preparation of the order and would allow Mr. Rabinowitz an opportunity——

[fol. 66] The Court: I know that is the practice for sentencing. I do not think I have the power, once I hold him in contempt or sentence a man to the custody of the Attorney General. I think I am finished as far as my jurisdiction is concerned. I know the Marshal does not go over to West Street until 4 o'clock, so he won't be too uncomfortable by 4.

Mr. Rabinowitz: That assumes, of course, that I can get a Circuit Court Judge by 4 P.M.

The Court: I know, but what we are all trying to do here is to make things very comfortable for everybody, when the man is in contempt. It might well be that Judge Weinfeld's order will be sustained.

Mr. Rabinowitz: I think that it may very well be, and it might very well be that it won't. In view of the fact that the purpose here is primarily to secure an adjudication, and sooner or later this statute will have to be tested, I just am trying to avoid any unnecessary inconvenience

to the client who, in a sense, is acting here as a test case, as a guinea pig, shall we say, for us.

I can proceed with as much speed as is physically possible. But I still will have to draw a notice of appeal, a notice of motion and affidavits. I might say that it has been done in draft form.

The Court: A notice of appeal is at least one side of one——

Mr. Rabinowitz: It is purely a mechanical problem and the matter of getting a Judge by 4 o'clock, that is the other mechanical problem.

The Court: I cannot help you. I do not think I have the power to forestall the surrender. If a Circuit Judge wants to let him out on bail or stay it, that is well and [fol. 67] good, but he will not leave this building until 4 o'clock at the earliest, is that right?

The Marshal: That is right.

The Court: So that is the judgment of this Court.

Mr. Taylor: The Government will undertake to prepare an order and commitment and present it to your Honor this afternoon as early as we can.

And, as I understand your Honor's sentence, it is six months or until he purges himself.

All right.

The Court: Do you need the Grand Jury back today? Should they go back or are they excused now?

Mr. Taylor: The Grand Jury is subject to recall.

[fol. 68] In United States District Court

No. C'146'338

United States of America

v.

William Ludwig Ullmann, Witness Before the 11, 3 54 Grand Jury

Order Appealed From, Dated March 8, 1954

On the 8th day of March, 1955, came the attorney for the government and the defendant appeared in person and by counsel. Defendant waived the notice provided by Rule

42(b) Fed. Rules Crim. Proc. and stipulated in open court that he had appeared before the Grand Jury on the 8th day of March, 1955, and had refused to obey the order of this Court dated 2-8-55, which order was issued pursuant to the opinion of U. S. D. J. Edward Weinfeld, dated Jan. 31, 1955 In Re William Ludwig Ullmann.

It is Adjudged that the defendant has been convicted for contempt of Court for refusal to obey the aforesaid order of this Court. And the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized [fol. 69] representative for imprisonment for a period of Six Months or unless he sooner purges himself of contempt.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(S) Thos. F. Murphy, United States District Judge.

NOTICE OF APPEAL—March 8, 1955

IN UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

v.

WILLIAM LUDWIG ULLMANN, Defendant

SIR:

Please take notice that the Defendant, William Ludwig Ullmann, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order of Honorable Thomas F. Murphy, United States District Judge, made on the 8th day of March, 1955, and entered in the

office of the Clerk of the United States District Court for [fol. 70] the Southern District of New York on the 8th day of March, 1955.

Dated: New York, N. Y., March 8, 1955.

Yours, etc., Nathan Witt, 9 East 40th Street, New York 16, N. Y., Leonard B. Boudin, 25 Broad Street, New York 4, N. Y., Attorneys for Defendant.

To: J. Edward Lumbard, Esq., United States Attorney for the Southern District of New York, Attorney for U. S. A., United States Courthouse, Foley Square, New York 7, N. Y.

[fol. 71] In United States Court of Appeals for the Second Circuit

No. 260

October Term, 1954

Argued March 16, 1955

Docket No. 23555

United States of America, Appellee

v.

William Ludwig Ullmann, Appellant

Before Clark, Chief Judge, Frank, Circuit Judge, and Galston, District Judge.

Appeal from a judgment for the United States District Court for the Southern District of New York, Entered by Judge Weinfeld. Affirmed.

Opinion Decided April 4, 1955

Frank, Circuit Judge:

The facts are fully stated in Judge Weinfeld's excellent opinion, F. Supp. , the reasoning and conclusions of which we adopt.

It is well to add a few words about defendant's contention concerning the doctrine of Brown v. Walker, 161 U. S. 591, which held that the Fifth Amendment privilege against self-incrimination relates solely to testimony which might lead [fols. 72-75] to defendant's prosecution for a crime. Defendant asks us to modify this doctrine in the light of new circumstances which have since arisen.[1] We are not pre-

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[1] Defendant's brief states the following:

"The Internal Security Act (64 Stat. 987 (1950)), 50 U. S. C. Secs. 740 et seq., federal executive orders and current loyalty procedures prohibit the employment of so-called subversives in government or defense facilities and make it unlawful for them to apply for or use passports. If the President declares the existence of 'an internal security emergency,' the Attorney General can intern anyone as to whom 'there is reasonable ground to believe that such person will probably engage in, or probably will conspire with others to engage in acts of espionage or sabotage.' 50 U. S. C. 812, 813).

"Employment as a longshoreman or in the privately owned merchant marine is subject to governmental screening (64 Stat. 428, 1950; 50 U. S. C., Sec. 191). Since June 1954, the Defense Department has promulgated an elaborate series of security regulations providing for the undesirable discharge of persons inducted into the Armed Forces under the Selective Service Acts for associations antedating their induction, with the consequent disgrace and economic injury. (See, for example, Department of the Army, Special Regulations S. R. 600-220.1.) It may reasonably be estimated that at least 15 million people are affected by security regulations imposed by the federal government.

"It is inconceivable that the government would license political dissenters to operate radio stations, would give them government contracts, or permit their employment in government jobs, defense plants, or other industries whose employment is controlled or regulated by it. The recently enacted statute which purports to deprive of citizenship persons convicted of Smith Act violations (Public Law, 83rd

[FOOTNOTE CONTINUED ON PAGE 57]

[FOOTNOTE CONTINUED FROM PAGE 56]

Cong., 2d Sess. (1954)) may be the precursor of extensive disabilities for persons compelled to make such admissions before congressional committees and grand juries.

"Obviously the immunity statute cannot relieve of these disabilities those who testify pursuant to its provisions. Certainly the Act was not intended to permit those who admit Communist Party membership before a grand jury thereby to become eligible for passports, for employment in the government or in defense facilities, for broadcasting station licenses, for retention in the armed forces and the right to remain outside concentration camps. All of the disabilities created by statute will exist just as effectively whether or not the immunity offered by the statute is, in fact, effective. Therefore, true immunity is not intended nor can it be given by the law. It could be argued, of course, that some of these disabilities might exist upon the basis of secret government information or might arise from the witness' assertion of his constitutional privilege. Without conceding the legality of the disabilities in either case, their existence does not mitigate the forfeiture arising from the compulsory disclosure or show that true immunity is given.

"In addition, there are innumerable state laws and municipal ordinances requiring registration. There are teacher's oath laws for loyalty and security purposes and there are political conditions of employment in state educational institutions and other state agencies. (See e.g., N. Y. Unconsolidated Laws, Chapter 14).

"The total punitive impact of these local regulations upon the witness compelled by federal authority to testify is truly terrifying. If the witness, admitting political guilt, is subjected to these local laws, he is receiving a meaningless 'immunity.' He has in fact surrendered his right to local employment and his freedom from local harassment by regulation or investigating committee, precisely because of such revelations. This dilemma points up the mockery of the 'immunity' concept in relation to 'subversive activities' today.

"In addition to the formal governmental sanctions, those exercised by the community and by private groups are so

[FOOTNOTE CONTINUED ON PAGE 58]

[FOOTNOTE CONTINUED FROM PAGE 57].

tremendous as to challenge an attempt at brief discussion. They include expulsion from labor unions, loss of private employment, discrimination in housing and schooling and public opprobrium.

"These sanctions are not generally regarded in the United States as reason for invoking the constitutional privilege. However, it is significant that in an analogous period of religious oppression, the 18th century, the English equity courts allowed witnesses to be silent where admissions of papacy would result in property loss (Harrison v. Southcote and Morehead, 2 Ves. sen. 389, 28 Eng. Rep. 249, 252 (Ch. 1751), or where ecclesiastical censure would follow (Finch v. Finch, 2 Ves. sen. 49, 28 Eng. Rep. 315 (Ch. 1752), or where a parliamentary seat was at stake. (Honeywood v. Selwin, 3 Atk. 276, 26 Eng. Rep. 961 (Ch. 1744)).

"Where the effect of political heresy is as serious as it is today, the dissenter is subject to penalties and forfeitures which, if anything, are more drastic than even criminal prosecution. This is not the place for a complete review of the employment opportunities of a political dissenter in the present political atmosphere. It is sufficient to say that government employment, federal, state or local, is effectively closed to such a person; that employment in a defense plant, in the entertainment industry, in a private educational institution, on a newspaper, in the advertising industry, in the merchant marine, as a longshoreman, and many similar occupations, is effectively closed. Only the most menial and low paying occupations are now available to many persons who have been branded as subversive by congressional committees, administrative agencies, or the daily press. Indeed, it might well be said that to many such persons the threat of criminal prosecution is the least of the concerns which face a man who is unable to pursue the occupation for which he has been trained.

"The beneficent purpose of the constitutional privilege cannot be achieved unless it is interpreted and applied in the light of the dangers today confronting the witness in a political case. Viewed in context, the statute does not give the witness the immunity to which he is constitutionally entitled."

pared to say that this suggestion lacks all merit.[2] But our possible views on the subject have no significance. For an inferior court like ours may not modify a Supreme Court doctrine in the absence of any indication of new doctrinal trends in that Court's opinions,[3] and we perceive none that are pertinent here. Accordingly, the argument must be addressed not to our ears but to eighteen others in Washington, D. C.

Affirmed.

[fol. 76] CLARK, Chief Judge (Concurring):

I concur, but regretfully. For the steady and now precipitate erosion of the Fifth Amendment seems to me to have gone far beyond anything within the conception of those justices of the Supreme Court who by the narrowest of margins first gave support to the trend in the 1890s. And serious commentators have found this new statute peculiarly disturbing in policy and in law. Griswold, The Fifth Amendment Today 80-84 (1955); Taylor, Grand Inquest 217-221, 296-300 (1955); Barth, Government by Investigation 130-134 (1955). It undermines and so far forth nullifies one of the basic differences between our justice and that of systems we contemn, namely the principle that the individual shall not be forced to condemn himself. Practically, as we know, no formal immunity can protect a minority deviator from society's dooms when he departs from its norms.

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[2] Cf. Taylor, Grand Inquest (1955) 217-221, 296-300; Griswold: The Fifth Amendment Today (1955) 80-81

[3] See Perkins v. Endicott Johnson Corp., 128 F. (2d) 208, 217-218 (C.A. 2):

"Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow, not to resist it." See also Picard v. United Aircraft Corp., 128 F. (2d) 632, 636 (C.A. 2); Judge Parker's opinion in Barnette v. West Virginia Board of Education, 47 F. Supp. 251, 252-253.

And realistically viewed there is much in the defendant's contention that at the end of the road is a charge of perjury supported by the oath of a renegade or paid informer. Convictions so obtained and punishment thus decreed cannot satisfy either the needs or the ideology of a democratic country committed to respect and toleration for dissident minorities. But I can see no escape from the Supreme Court decisions so carefully analyzed by Judge Weinfeld which, while they stand, are binding on us.

[fol. 77] Galston, District Judge (Concurring):

If this matter were one of first impression I could easily reach the conclusion that the immunity statute in question is in effect a circuitous attempt to circumvent the Constitution by a short-cut legislative statute amending the Fifth Amendment. However, it would appear that the authorities support the contention that Congress has the power to compel testimony by the enactment of an immunity statute which provides an immunity co-extensive with privilege against self-incrimination. Brown v. Walker, 161 U. S. 591; Smith v. United States, 337 U. S. 137. Secondly, that being so, consistently it can be argued that the statute is not invalid for failure expressly to grant immunity from state prosecution. United States v. Murdock, 284 U. S. 141; Feldman v. United States, 322 U. S. 487. See also Jack v. Kansas, 199 U. S. 372.

The good faith of the Attorney General when he acts under Section 3486 (c) should be assumed.

[fol. 78] In United States Court of Appeals for the Second Circuit

United States of America, Plaintiff-Appellee,

v.

William Ludwig Ullman, Defendant-Appellant

Judgment, April 4, 1955

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[fol. 79] [File endorsement omitted.]

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] Supreme Court of the United States, October Term, 1954

No. 763

[Title omitted]

Order Allowing Certiorari—Filed June 6, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

HAROLD B. WILEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~[illegible]~~ 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court, reported at 128 F. Supp. 617, is set forth in the Appendix to Appellant's Brief in the Court of Appeals, pages 36a to 54a. The opinion of the Court of Appeals has not yet been reported, but is set forth in the same Appendix, pages 71a to 77a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1955 (App. 68a). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

The Statute and Constitutional Provisions Involved

This case involves the Immunity Act of 1954, Public Law 600, 83rd Cong., 68 Stat. 833, 18 U. S. C. § 3486; Article III and the First and Fifth Amendments to the Constitution of the United States. The text of the statute is set forth in App. A to this petition.*

Statement of the Case

On August 20, 1954, Congress enacted Public Law 600, 83rd Cong., 68 Stat. 833, amending 18 U. S. C. 3486. It established a procedure to compel witnesses before congressional committees, grand juries and courts to testify, notwithstanding their proper assertion of the constitutional privilege under the Fifth Amendment, by an order of the United States District Court. The witness would thereby be granted immunity from prosecution, penalties and forfeitures; as indicated below, the precise scope of the immunity is uncertain. This is the first statute granting such power to the courts in the history of this country.

On November 4, 1954, the United States Attorney for the Southern District of New York made a written application to the District Court, upon notice to petitioner, for an order under the statute directing him to testify before a federal grand jury (App. 2a). The application merely stated that the grand jury was investigating the commission of wartime espionage and that petitioner had declined to answer certain specified questions. The application recited the "judgment" of the United States Attorney that immunity be granted and the "approval" of the Attorney

* App. A and App. B refer respectively to the statute and Opinions of the Court of Appeals set forth in Appendices A and B to this Petition. All other references to the Appendix (or App.) are to the Appendix to Appellant's Brief in the Court of Appeals.

General. It was accompanied by the latter's letter of approval (App. 7a).

Petitioner filed an affidavit in opposition to the application (App. 9a-28a-c). Respondent filed answering affidavits (App. 28d-37a) and, upon the request of the District Court, an affidavit of good faith (App. 8a-9a).

Petitioner's affidavit, which was not substantially disputed with respect to the material allegations, set forth the following: Petitioner and other former officials of the United States Treasury Department were accused of espionage by one Elizabeth Bentley in 1945 and thereafter. Since 1947, petitioner has been interrogated once by the Federal Bureau of Investigation, four times by congressional committees and three times by federal grand juries on this subject. Despite petitioner's repeated denials of espionage, the Attorney General of the United States made a similar public accusation.* Petitioner's affidavit shows that this espionage charge has been made by the Attorney General into a major political issue and that a denial today of the espionage charges would probably lead to an unfounded indictment of him for perjury.

The government introduced no evidence in denial of petitioner's charges or otherwise, in support of the application. The District Court denied petitioner's request that it examine the grand jury minutes to determine whether the grand jury was engaged in a bona fide investigation into crime.

Instead, on February 1, 1955, the District Judge rendered his decision sustaining the constitutionality of the statute, holding that the court played no part in the grant of immunity and that the government was under no duty to

* Hearings before Subcommittee to Investigate the Administration of the Internal Security Acts and other International Security laws, Committee on the Judiciary, United States Senate, 83rd Congress, 1st Sess., on Interlocking Subversion in Government Departments, Part 16, pp. 1110-1141 (1953).

produce evidence in support of its application (App. 36a). He overruled the constitutional and other objections made by petitioner to certain of the questions.

The District Court order, entered on February 8, 1955, made no findings of fact with respect to the necessity or propriety of the testimony (App., 55a), and it directed petitioner to appear and to answer pursuant to the statute not only the questions set forth in the application but all instated questions on the same subject. The court did not make an explicit grant of immunity in its order nor did it indicate precisely what immunity was given to the witness compelled thus to testify.

On March 8, 1955, petitioner upon declining to answer the questions put to him by the grand jury was convicted of contempt in the District Court. The court entered judgment sentencing him to six months' imprisonment with the right to purge (App. 68a).

The Court of Appeals affirmed the conviction, each judge writing a separate opinion. These opinions indicated that the court felt itself bound by this Court's decision in *Brown* v. *Walker*, 161 U. S. 591, although as an original proposition it would have decided the matter in favor of petitioner, especially in view of the factual situation presented here (App. B).

Questions Presented

1. Whether under the statute immunity is granted by the Attorney General alone, or by the court upon the application of the government.

2. Whether the grant of immunity by the court is a constitutional exercise of a judicial function, and, if so,

whether the court may grant such immunity without a record in support thereof.

3. Whether the constitutional privilege of the Fifth Amendment must not be read literally to prohibit any compulsion to testify notwithstanding any promises of immunity.

4. Whether the statutory grant of immunity is not illusory since the witness, by testifying, will subject himself to penalties and forfeitures arising from the federal, state, institutional and group sanctions today imposed upon political dissenters.

5. Whether the constitutional privilege does not guarantee petitioner protection against incrimination under state law and, if so, whether Congress intended to and could constitutionally effectuate this guaranty by delegating the immunity power to the United States Attorney.

6. Whether petitioner was properly directed to testify where the Government's purpose was to compel testimony for which he would be indicted for perjury.

7. Whether the questions as to political affiliations were not immaterial to an inquiry into espionage and were not violative of the First Amendment.

8. Whether the order below complied with the Fifth Amendment and the statute in view of the absence from the order of an express grant of immunity and the refusal of the District Court to define the scope of the immunity grant.

Reasons for Granting the Writ

1. The statute does give the District Court the power to grant immunity.

In national security cases the United States Attorney "upon the approval of the Attorney General, shall make application to the Court that the witness shall be instructed to testify * * * and upon order of the Court such witness shall not be excused from testifying. * * *"

The government claims and the courts below apparently agree that the function of the Court on such an application is the same as the function of the Court in any situation in which application of the immunity statute is not involved. See for example: *Carlson v. United States*, 209 F. 2d 209 (C. A. 1, 1954) and companion cases.

Petitioner, on the other hand, urges that the statutory language above quoted was intended not merely to restate the law of the *Carlson* case but to give to the District Court the duty of approving the propriety of the grant of immunity. Indeed, this precise point was the subject of extensive discussion in the 82nd and 83rd Congresses, and Congress considered and expressly rejected a series of bills which would have called for the procedure which the government claims is applicable here. Moreover, those bills were rejected precisely *because* they did not require court approval of a grant of immunity.

Between 1951 and 1954 Congress had before it a series of proposals providing for a grant of immunity to witnesses before congressional committees, grand juries and courts. From the very beginning a sharp difference of opinion arose on the question of what government agency or combination of agencies was to be assigned the duty of approving the grant of immunity. These differences of opinion as well as doubts as to the constitutionality of any bill prevented passage of an immunity law in the 82nd Congress.

In the first session of the 81st Congress, S. 1649 confined immunity to witnesses before congressional committees. It passed the Senate. That bill was referred to a subcommittee of the Judiciary Committee of the House, as was H. R. 6899, introduced by Rep. Keating. It applied not only to witnesses before congressional committees, but also to witnesses before grand juries and courts; furthermore, it gave to the Attorney General the sole power to grant immunity, providing:

> "Whenever, in the judgment of the Attorney General, the testimony of any witness * * * in any case or proceeding before any grand jury or Court of the United States, is necessary to the public interest, such witness shall not be excused from testifying * * *; but such witness shall not be prosecuted * * *."

No reference was made to a court order, because no court order granting immunity was contemplated.

The subcommittee of the House Judiciary Committee to which the Keating bill was referred amended it. *But the Keating bill was rejected by the full committee.* Instead an amended bill was recommended by the committee and ultimately passed by Congress. The Committee's amendment substituted the language which now appears in the statute, and explained its amendment by saying:

> "The full committee amendment requires that application be made to a court after approval of the Attorney General that the witness be instructed to testify or produce evidence whereas under H. R. 6899 [the Keating bill] only the approval of the Attorney General was necessary prior to granting immunity." (H. Rep. No. 2606, 81st Cong., 2d Sess., p. 4).

The Committee discussed the procedure to be followed in the case of a recalcitrant witness before a committee:

> "Finally, before the immunity is actually granted to the witness, the approval of the United States District Court wherein the inquiry is being conducted is to be obtained.

"In cases before a grand jury or a court similar precaution exists" (*id.*, p. 8).

Prior to the inception of this litigation and the submission of the government brief in the District Court, there was no confusion at all as to what this law meant. Rep. Keating, who was the manager for the House Judiciary Committee of the bill reported out by it, said, in the course of the congressional debate, that a grant of immunity "requires approval of both the prosecutor and the Court" (100 Cong. Rec. 12603). Similar views were expressed by Rep. Celler (*id.* at 12604) and by Rep. Hyde (*id.* at 12607).

Several months after the passage of the law, but before the inception of this litigation, the Attorney General likewise agreed that immunity "*will be granted by a Federal District Judge, after advice from the Attorney General,* upon petition of a United States Attorney or a representative of Congress." (Address at Twentieth Century General Congress, General Society of Mayflower Descendants, Plymouth, Massachusetts, September 13, 1954, pp. 5-6; italics supplied.)

The District Court sought to distinguish the language used in Sections (a) and (b) of the statute, relating to congressional committees, from the language used in subdivision (c) of the statute relating to grand juries. The court, however, overlooked the fact that the bill ultimately reported was a combination of two separate bills (S. 16 and H. R. 6899) and hence included two separate formulations. Further, the court assumed a preciseness in statutory language which rarely exists and which certainly could not be expected in view of the haste with which the bill, several times quickly revised, went through with limited debate.

The District Court further found that the statutory history was itself ambiguous, a finding inexplicable in view of the clear intent expressed over and over again both in the Judiciary Committee report and on the floor of the House itself.

Congress expressly rejected a statute which gave exclusive power to grant immunity to the Attorney General. The government thus seeks to impose upon Congress a statute which it expressly and repeatedly refused to pass, solely to transform an unconstitutional statute into a constitutional one.

2. The power to grant immunity is not a judicial function; if it be held to be a judicial function it was improperly exercised here because no record was made in the District Court in support of an order granting immunity.

If the grant of immunity be viewed as a pardon, it is clear that the power to grant pardons rests exclusively in the President of the United States and cannot be delegated (Constitution, Art. II, Section 2; *Ex Parte Garland*, 4 Wall. 333, 71 U. S. 333). If the grant of immunity be construed as a grant of amnesty for crimes committed, it is probably a legislative function. This seems to have been the reasoning of the court in *Brown v. Walker*, 161 U. S. 591, and is certainly the core of the decision of Chief Judge Cardozo in *Doyle v. Hofstadter*, 257 N. Y. 244.

The determination of whether immunity ought to be granted involves consideration of many important policy problems. These have been summarized by John M. Kaufman, Director of the Legislative Drafting Research Fund of Columbia University:

> "Is the evidence expectable from W. (this witness) so important to this proceeding, and is this proceeding so important, that W. should now be compelled to give his evidence and so be immunized, in spite of the offense for which he may go unpunished and in spite of the damage his immunity may do to present or future efforts to enforce the criminal laws of this state or to the wider public interest in a just, orderly society?" (II Organized Crime and Law Enforcement, pp. 168-9).

Clearly this is not the stuff of judicial decisions. We need merely call this Court's attention to such classic cases as *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210; *Hayburn's Case*, 2 Dall 409 (U. S. 1792) and *Gordon v. U. S.*, 117 U. S. 697.

It is significant that none of the immunity statutes either in the federal government or, so far as we know, in state governments, gives to a court any function in the grant of immunity.

Even if the granting of immunity by a court be held to be a judicial function, a reversal of the conviction here is still required under the statute and the due process clause of the Constitution. For the District Court had no facts at all upon which a decision granting immunity could possibly have been reached. To the extent that any record was made it was made by petitioner, who affirmatively showed that the application should be denied.

The government's failure to present evidence in support of a grant of immunity to petitioner was not an oversight; it was the consequence of the government's contention that such evidence was not required under the statute. The District Court was never told what reasons, in the government's view, justified any grant of immunity. It did not even examine the grand jury minutes. It was merely given the United States Attorney's "judgment" that immunity should be granted and the Attorney General's "approval" of that judgment, predicated upon undisclosed facts, assuming that any existed at all.

A court of the United States is not an auxiliary of the Department of Justice. Its decisions cannot be determined by the judgment of prosecuting officials, without more. It cannot judicially act upon an application when not a single relevant factor is presented in support thereof.

Petitioner, on the other hand, submitted a detailed affidavit showing why the immunity power should not be exercised by the court (App. 9a-28a). We will not summarize

that affidavit here except to note that it alleges that the investigation which the grand jury was undertaking was political in nature and part of a program on which the present administration had embarked to convince the American people that petitioner and other employees of the preceding administration were guilty of espionage.

Hence, petitioner had reasonable ground to fear the possibility that his testimony before the grand jury, even under a grant of immunity, might result in an indictment for perjury arising from the testimony itself. We recognize that a witness may not ordinarily assert his constitutional privilege for fear of an indictment for perjury arising from his testimony. But the question here is quite different, namely, should a witness, faced with the extraordinary danger shown on this record, be required to furnish the occasion for his perjury prosecution? This is not a fanciful fear. It must be viewed against the recent history of the misuse of grand juries and the adoption by the government of techniques under which persons who cannot be prosecuted for substantive crimes are trapped into testimony which is the basis for perjury indictments. (See the concurring opinion of Chief Judge Clark below (App. B); also *U. S.* v. *Hiss*, 185 F. 2d 822, cert. den. 340 U. S. 948; *U. S.* v. *Remington*, 191 F. 2d 246 (2d Cir.), cert. den. 343 U. S. 907; *U. S.* v. *Lattimore*, 215 F. 2d 847, decided July 8, 1954; see *Matter of United Electrical & Radio Machine Workers of America*, 111 F. Supp. 858) on the extraordinary evolvement today of the grand jury as a political non judicial instrument.

3. The statute, as the present chairman of the House Judiciary Committee well said, "bristles with constitutional snarls and questions" (100 Cong. Rec. 12605). A major one is whether the constitutional privilege of the Fifth Amendment is not to be read literally. This would mean that no person can be compelled to testify against himself regardless of the considerations offered. It would not preclude the voluntary exchange of immunity for information.

This was the view of four dissenting members of this Court in *Brown v. Walker*, *supra*, and of Judge Galston in the court below (App. B).

Of course, this Court in *Brown v. Walker* came to a contrary conclusion which has been accepted without critical analysis in several later decisions involving federal immunity laws, such as *Hale v. Henkel*, 201 U. S. 43.* We think that the reasoning of the minority in *Brown v. Walker*, the language of the Constitution and the required liberality of its interpretation, justify reconsideration of the compulsory-bargain interpretation made by a majority of this Court nearly sixty years ago.

4. The statute cannot, in today's circumstances, give true immunity against "legal detriment" within the meaning of the Constitution and the *majority* opinion in *Brown v. Walker*.

This case therefore requires not the repudiation of the decision in that case, as the District Court thought, but its proper and realistic application to the legal, economic, social and political sanctions operative upon the political dissenter today compelled to reveal his views. It was this point which met with acceptance by each member of the Court of Appeals who felt that the matter should be considered by this Court.

These sanctions are so powerful in today's legal, social and economic climate that they render illusory the so-called immunity against prosecution. They strike at the ability of the witness to earn a livelihood for himself and his family; he literally has a problem of survival because so

* There was no occasion for reviewing the matter in cases (1) enforcing state immunity laws such as *Jack v. Kansas*, 199 U. S. 372; (2) reversing convictions based upon testimony given under federal immunity laws, *Smith v. United States*, 337 U. S. 137; (3) involving congressional contempt issues where discussion of immunity was clearly dictum, *United States v. Bryan*, 339 U. S. 323, or (4) involving federal use of state compelled testimony, *Feldman v. United States*, 322 U. S. 487.

many areas of employment are controlled today by government, either directly or indirectly, and few are the employers who are not critically influenced by government opinion. They strike, too, at the witness' right to travel in pursuit of a livelihood, or for pleasure or education. They even affect his freedom from detention upon the declaration of a national emergency. A summary of these penalties and forfeitures, far more serious than mere imprisonment for crime, is set forth in Judge Frank's opinion, footnote 1 (App. B).

As we re-read the court's opinion in *Brown* v. *Walker*, *supra*, we are convinced that it would unanimously have recognized the illusory nature of the immunity offered appellant under this statute. It must be remembered that the court was openly skeptical of how Brown could suffer any personal odium from his employer's violation of the Interstate Commerce Act. In the present case we are not talking about odium and disgrace, the issue which divided the court in *Brown* v. *Walker*, but the imposition of the extraordinary sanctions employed today against political dissenters.

5. Another constitutional defect of this law is that the witness remains liable to state prosecution for crime. This raises most important problems in the construction of the constitutional privilege of the Fifth Amendment, in the administration of criminal justice and in state-federal relations under the Constitution. They have never been thoroughly assessed by this Court, either in *U. S.* v. *Murdock*, 284 U. S. 141, or in the subsequent cases which followed, without analyzing, that decision.

This issue involves three preliminary determinations: (a) Does the constitutional privilege protect the federal witness against divulging matters tending to incriminate under state law; (b) Does the statute purport to and did Congress intend to prohibit state prosecutions; (c) Does Congress have such power under the Constitution?

(a) A construction of the constitutional privilege which would deny that this is one nation geographically and

politically would be absurd. For the federal government to compel self-accusation leading to state criminal prosecution is to deny the realities of our federal system of government and the collaboration between state and federal government particularly in the area of subversive activities.

Long before the witnesses' problem became so acute this Court through Chief Justice Marshall and Mr. Justice Holmes rejected this insular theory of immunity (*United States* v. *Saline Bank*, 1 Pet. 100, and *Ballman* v. *Fagin*, 200 U. S. 186). Indeed, *Brown* v. *Walker* adopts the theory that the federal government has an obligation, hence a power, to control state prosecutions. However, a series of cases culminating in the *Murdock* case did develop the double-sovereignty theory. Each of them was actually based upon the absence of any real danger of prosecution by the other sovereignty, and mistakenly relied upon the English cases which involved different nations, ignorance of foreign law, no real danger, or all three. *Murdock* was actually a decision by default, the appellee not seeking to justify his claim of danger of state incrimination, and it cannot withstand critical evaluation by this Court. See: J. A. C. Grant, *Immunity From Compulsory Self-Incrimination in a Federal System of Government*, 9 Temple Law Quarterly 57, 194 (1934-5); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. Law Review 1, 39 (1949).

The state courts have increasingly in recent years recognized the invalidity of the double-sovereignty rule and the federal courts have likewise moved in that direction. *People* v. *Ligi*, 193 Mich. 17; *In re Watson*, 293 Mich. 263, 285; *Gould* v. *Gould*, 201 App. Div. (N. Y.) 674; *State ex rel. Mitchell* v. *Kelly*, 71 So. 2d 887, 897 (Fla. 1954); *United States* v. *Di Carlo*, 102 F. Supp. 597. See also *Marcello* v. *United States*, 196 Fed. 2d 437.

(b) The statute, on its face, prohibits state use of the federally compelled testimony, but not state prosecution with respect to the subject of the testimony. It is by no

means clear what Congress intended in view of the provisions of and Senate debates on S. 16, the modifications suggested by *Adams* v. *Maryland*, 347 U. S. 179, and the differing views of the House Judiciary Committee. Hence the uncertainty of Representatives Celler and Dodd which must be resolved by this Court's interpretation of the statute (100 Cong. Rec. 12606).

(c) But if the District Court's construction is correct and all state prosecutions are prohibited by the immunity grant, very serious questions of federal power are involved. This Court has never before or since *Brown* v. *Walker* suggested the existence of that great federal power.* Instead it has principally rested (even in *Brown* v. *Walker*) upon the unlikelihood of state prosecutions. That argument cannot be made today with the states vigorously competing with the federal government often for the same victims, as in *Commonwealth* v. *Nelson*, 377 Pa. 58, cert. grant. sub nom. *Pennsylvania* v. *Nelson*, 348 U. S. 814; *Nelson* v. *Wyman*, 105 Atl. 2nd 756.

The District Court's reliance upon the principles of federal supersedure was unsound: (1) Supersedure by substantive regulation occupying the field under Article VI of the Constitution is very different from supersedure by exercise of the mere power of inquiry. None of the classic reasons for supersedure exist in this situation, particularly since "immunity is not an implied or inherent incident of a power to investigate". *Dingle* v. *Hotstadter*, *supra*. (2) Nor would this be the case of Congress occupying the field: rather it would be a prosecutor's suspension, in a particular case, of the enforcement of a state law, raising, in addition, the issue of an unlawful delegation of power.

6. The court also has before it for the first time for consideration the propriety of a grand jury inquiry into political party membership in the guise of an inquiry into

* Doubt as to the existence of such power was expressed to the Senate by John W. Davis, Philip B. Perlman and other eminent lawyers (99 Cong. Rec. 4742-3, 8343-8353).

espionage. The cases relied upon by the District Court, which involve the right of the House Un-American Activities Committee to investigate political propaganda are not relevant because (a) a grand jury is limited to investigations of crime, not of propaganda, and (b) courts have been reluctant to interfere with a coordinate branch of the government. In determining whether testimony should be compelled here, this Court must decide whether the federal courts will permit the juries under their supervision to harass minority groups.

Further, First Amendment rights aside, inquiries into this subject are not *bona fide* investigations of crime, because it is not a crime to be a member of the Communist Party. These inquiries are sources of entrapment, because of the vagueness of the concept of membership in a political party (*United States v. Remington, supra*). See also *Hearings on Institute of Pacific Relations* before Subcommittee on Internal Security, 82nd Cong., 1st and 2nd Sess., pp. 3523; 3526, where Dr. Owen Lattimore and the Internal Security Subcommittee had considerable difficulty in reaching a definition of that term. The new Communist Control Act of 1954 (Public Law 637, 83rd Cong., 2nd Sess., Sec. 5) sets forth fourteen criteria of Communist Party membership which accentuate the seriousness of the problem. Even before this statute, the views of a witness on the subject of trade with China were considered relevant to a jury's determination of Communist Party membership (*United States v. Bridges*, 199 Fed. 2d 811, rev'sd 346 U. S. 209). Respondent's ready use of such elastic terms as "a sympathizer or any other kind of promoter of Communism or Communist interest" is notorious (*U. S. v. Lattimore, supra*).

7. The District Court was originally of the opinion that "the order should contain a very clear and unequivocal grant of the immunity." But respondent argued that "the matter

* This appears in the Stenographic Minutes of the Hearing before the District Court which were submitted to the court below and will be filed with the Clerk of this Court.

of the extent of the immunity which will accrue to [petitioner] by his testimony is after all not directly at issue now. That question will only arise should an attempt later be made to prosecute [petitioner]." * As a result, the order contains no grant of immunity nor even a reference to its scope.

Thus, the so-called immunity statute which began with uncertainty ends, as intended by the government, in even greater uncertainty. It promises vague benefits, creates such hazards and leaves the witness so helpless and ignorant of his fate that the order to testify cannot stand as a valid direction to surrender the historic privilege guaranteed petitioner by the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN WITT,
LEONARD B. BOUDIN,
Attorneys for Petitioner.

VICTOR RABINOWITZ,
of Counsel.

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* This statement appears in the Government's memorandum in the District Court in Opposition to the Counter-Order, p. 6, which likewise will be filed with the Clerk of this Court.

APPENDIX A

18 U. S. C. § 3486

Compelled testimony tending to incriminate witnesses; immunity.

(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee

concerned. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court.

(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212 (a) (27), (28), (29) or 241 (a) (6), (7) or 313 (a) of the Immigration and Nationality Act (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is necessary to public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the pro-

visions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

APPENDIX B

Opinion.

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

No. 268 OCTOBER TERM, 1954

Argued March 16, 1955 Decided April 4, 1955

Docket No. 23555

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM LUDWIG UELMANN,
Appellant.

Before:

CLARK, Chief Judge, FRANK, Circuit Judge, and GALSTON, District Judges.

Appeal from a judgment for the United States District Court for the Southern District of New York, entered by Judge Weinfeld. AFFIRMED.

J. Edward Lumbard, United States Attorney for the Southern District of New York, for appellee.

Nathan Witt and Leonard B. Boudin (Victor Rabinowitz, of counsel), for appellant.

FRANK, Circuit Judge:

The facts are fully stated in Judge Weinfeld's excellent opinion, E. Supp. , the reasoning and conclusions of which we adopt.

It is well to add a few words about defendant's contention concerning the doctrine of Brown v. Walker, 161 U. S. 591, which held that the Fifth Amendment privilege against self-incrimination relates solely to testimony which might lead to defendant's prosecution for a crime. Defendant asks us to modify this doctrine in the light of new circumstances which have since arisen.[1] We are not prepared to say that this suggestion lacks all merit. But our possible views on the subject have no significance. For an inferior court like ours may not modify a Supreme Court doctrine in the absence of any indication of new doctrinal trends in that Court's opinions, and we perceive none that are pertinent here. Accordingly, the argument must be addressed not to our ears but to eighteen others in Washington, D. C.

Affirmed.

[1] Defendant's brief states the following:

"The Internal Security Act (64 Stat. 987 (1950), 50 U. S. C. Secs. 740 et. seq., federal executive orders, and current loyalty procedures prohibit the employment of so-called subversives in government or defense facilities and make it unlawful for them to apply for or use passports. If the President declares the existence of 'an internal security emergency,' the Attorney General can intern anyone as to whom 'there is reasonable ground to believe that such person will probably engage in, or probably will conspire with others to engage in acts of espionage or sabotage.' (50 U. S. C. 812, 813).

"Employment as a longshoreman or in the privately owned merchant marine is subject to governmental screening (64 Stat. 428, 1950; 50 U. S. C. Sec. 191). Since June 1954 the Defense Department has promulgated an elaborate series of security regulations providing for the undesirable discharge of persons inducted into the Armed Forces under the Selective Service Acts for associations antedating their induction with the consequent disgrace and economic injury. (See, for example, Department of the Army, Special Regulations S. R. 600-220-1). It may reasonably be estimated that at least 15 million people are affected by security regulations imposed by the federal government.

"It is inconceivable that the government would license political dissenters to operate radio stations, would give them govern-

ment contracts; or permit their employment in government jobs, defense plants, or other industries whose employment is controlled or regulated by it. The recently enacted statute which purports to deprive of citizenship persons convicted of Smith Act violations (Public Law, 83rd Cong., 2d Sess. (1954)) may be the precursor of extension to persons compelled to make such admissions before congressional committees, and grand juries.

"Obviously the immunity statute cannot relieve of these disabilities those who testify pursuant to its provisions. Certainly the Act was not intended to permit those who admit Communist Party membership before a grand jury thereby to become eligible for passports, for employment in the government or in defense facilities, for broadcasting station licenses, for retention in the armed forces and the right to remain outside concentration camps. All of the disabilities created by statute will exist just as effectively whether or not the immunity offered by the statute is, in fact, effective. Therefore, true immunity is not intended nor can it be given by the law. It could be argued, of course, that some of those disabilities might exist upon the basis of secret government information or might arise from the witness' assertion of his constitutional privilege. Without conceding the legality of the disabilities in either case, their existence does not mitigate the forfeiture arising from the compulsory disclosure or show that true immunity is given.

"In addition, there are innumerable state laws and municipal ordinances requiring registration. There are teacher's oath laws for loyalty and security purposes and there are political conditions of employment in state educational institutions and other state agencies. (See, e.g., N. Y. Unconsolidated Laws, Chapter 14).

"The total punitive impact of these local regulations upon the witness compelled by federal authority to testify is truly terrifying. If the witness, admitting political guilt, is subjected to these local laws, he is receiving a meaningless 'immunity.' He has in fact surrendered his right to local employment and his freedom from local harassment by regulation or investigating committee, precisely because of such revelations. This dilemma points up the mockery of the 'immunity' concept in relation to 'subversive activities' today.

"In addition to the formal governmental sanctions, those exercised by the community and by private groups are so tremendous as to challenge an attempt at brief discussion. They include expulsion from labor unions, loss of private employment, discrimination in housing and schooling and public approbrium.

"These sanctions are not generally regarded in the United States as reason for invoking the constitutional privilege. How-

ever, it is significant that in an analogous period of religious oppression, the 18th Century, the English equity courts allowed witnesses to be silent where admissions of papacy would result in property loss (Harrison v. Southcote and Mohehead, 2 Ves. sen. 389, 28 Eng. Rep. 249, 252 (Ch. 1751)), or where ecclesiastical censure would follow (Finch v. Finch, 2 Ves. sen. 491, 28 Eng. Rep. 315 (Ch. 1752)), or where a parliamentary seat was at stake (Honeywood v. Selwin, 3 Atk. 276, 26 Eng. Rep. 961 (Ch. 1744)).

"Where the effect of political heresy is as serious as it is today, the dissenter is subject to penalties and forfeitures which, if anything, are more drastic than even criminal prosecutions. This is not the place for a complete review of the employment opportunities of a political dissenter in the present political atmosphere. It is sufficient to say that government employment, federal, state or local, is effectively closed to such a person; that employment in a defense plant, in the entertainment industry, in a private educational institution, on a newspaper, in the advertising industry, in the merchant marine, as a longshoreman, and many similar occupations, is effectively closed. Only the most menial and low-paying occupations are now available to many persons who have been branded as subversive by congressional committees, administrative agencies, or the daily press. Indeed, it might well be said that to many such persons the threat of criminal prosecution is the least of the concerns which face a man who is unable to pursue the occupation for which he has been trained.

"The beneficent purpose of the constitutional privilege cannot be achieved unless it is interpreted and applied in the light of the dangers today confronting the witness in a political case. Viewed in context, the statute does not give the witness the immunity to which he is constitutionally entitled."

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* Cf. Taylor, Grand Inquest (1955), 217-228, 296-300; Griswold, The Fifth Amendment Today (1955), 80-81.

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* See Perkins v. Endicott Johnson Corp., 128 F. (2d) 208, 217-218 (C. A. 2):

"Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty cautiously to be sure, to follow not to [illegible] it."

See also Picard v. United Aircraft Corp., 128 F. (2d) 632, 636 (C. A. 2); Judge Parker's opinion in Barnette v. West Virginia Board of Education, 47 F. Supp. 251, 252-253.

CLARK, Chief Judge (concurring):

I concur, but regretfully. For the steady and now precipitate erosion of the Fifth Amendment seems to me to have gone far beyond anything within the conception of those justices of the Supreme Court who by the narrowest of margins first gave support to the trend in the 1890s. And serious commentators have found this new statute peculiarly disturbing in policy and in law. Griswold, The Fifth Amendment Today 80-81 (1955); Taylor, Grand Inquest 217-221, 296-300 (1955); Barth, Government by Investigation 130-134 (1955). It undermines and so far forth nullifies one of the basic differences between our justice and that of systems we condemn, namely the principle that the individual shall not be forced to condemn himself. Practically, as we know, no formal immunity can protect a minority deviator from society's dooms when he departs from its norms. And realistically viewed there is much in the defendant's contention that at the end of the road is a charge of perjury supported by the oath of a renegade or paid informer. Convictions so obtained and punishment thus decreed cannot satisfy either the needs or the ideology of a democratic country committed to respect and toleration for dissident minorities. But I can see no escape from the Supreme Court decisions so carefully analyzed by Judge Weinfeld which, while they stand, are binding on us.

GAUSON, District Judge (concurring).

If this matter were one of first impression I could easily reach the conclusion that the immunity statute in question is in effect a circuitous attempt to circumvent the Constitution by a short-cut legislative statute amending the Fifth Amendment. However, it would appear that the authorities support the contention that Congress has the power to compel testimony by the enactment of an immunity statute which provides an immunity co-extensive with privilege against self-incrimination. Brown v. Walker, 161 U. S. 591; Smith v. United States, 337 U. S. 137. Secondly, that being so, consistently it can be argued that the statute is not invalid for failure expressly to grant immunity from state prosecution. United States v. Murdock, 284 U. S. 141; Feldman v. United States, 322 U. S. 487. See also Mack v. Kansas, 199 U. S. 372.

The good faith of the Attorney General when he acts under Section 3486(c) should be assumed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER

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Attorney for Petitioner.

On the Brief:
LEONARD B. BOUDIN,
VICTOR RABINOWITZ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER

Opinions Below

The opinions of the Court of Appeals (R. 54-60) are reported at 221 F. 2d 760. The opinion of District Judge Weinfeld (R. 28) on the government's application for an order compelling the witness to testify is reported at 128 F. Supp. 617. There was no opinion rendered by District Judge Murphy who adjudicated petitioner guilty of contempt for failing to comply with Judge Weinfeld's order (R. 53).

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1955 (R. 60). The petition for a writ of certiorari was granted on June 6, 1955 (R. 61). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Statute Involved

This case involves the Immunity Act of 1954, Public Law 600, 83rd Congress, 68 Stat. 745, 18 U. S. C., Section 3486. The text of the statute is set forth in the appendix.

Questions Presented

1. Whether the constitutional privilege of the Fifth Amendment must not be read literally in this case to prohibit any compulsion to testify notwithstanding any promises of immunity.

2. Whether the statutory grant of immunity is not illusory since the witness, by testifying, will subject himself to prosecution, penalties and forfeitures arising from the federal, state, institutional and group sanctions today imposed upon political dissenters.

3. Whether the constitutional privilege guarantees petitioner protection against state criminal prosecution and, if so, whether Congress intended to and could constitutionally effectuate this guarantee by delegating the immunity power to federal officials.

4. Whether under the statute immunity is granted by the Attorney General alone or by the court upon the application of the United States Attorney.

5. Whether the grant of immunity by the court is a constitutional exercise of a judicial function, and, if so, whether the court may issue such order without a record to support that action.

6. Whether petitioner was properly directed to testify where the government's purpose was to compel testimony for which he might be indicted for perjury.

7. Whether in an espionage investigation questions as to political affiliations were not improper and violative of the First Amendment.

8. Whether the order below complied with the due process clause of the Fifth Amendment and with the statute where the order contained no express grant of immunity, and the District Court refused to define the scope of the immunity grant.

Statement of the Case

On August 20, 1954 Congress enacted Public Law 600, 83rd Cong.; 68 Stat. 745, amending 18 U. S. C. 3486. It established a procedure to compel witnesses before congressional committees, grand juries and courts to testify, notwithstanding their proper assertion of the constitutional privilege under the Fifth Amendment, by an order of the United States District Court. The witness would thereby be granted immunity from prosecution, penalties and forfeitures whose precise scope, as we shall see, is uncertain. This is the first statute granting such power to the federal courts in the history of this country.

On November 4, 1954, the United States Attorney for the Southern District of New York made a written application to the District Court, Weinfeld, J., upon notice to petitioner, for an order under the statute directing him to testify before a federal grand jury (R. 1). The applica-

tion merely stated that the grand jury was investigating the commission of wartime espionage and that petitioner had declined to answer certain specified questions, relying on his privilege under the Fifth Amendment. The application recited the "judgment" of the United States Attorney that immunity be granted and the "approval" of the Attorney General. It was accompanied by the latter's letter of approval (R. 5).

Petitioner filed an affidavit in opposition to the application (R. 7-22). Respondent filed answering affidavits and, upon the request of the District Court, an affidavit of good faith (R. 6-25).

Petitioner's affidavit, which was not substantially disputed with respect to the material allegations, set forth the following: Petitioner and other former officials of the United States Treasury Department were accused of espionage by one Elizabeth Bentley in 1945 and thereafter. Since 1947 petitioner has been interrogated on this subject once by the Federal Bureau of Investigation, four times by congressional committees and three times by federal grand juries (R. 9-10). Despite petitioner's repeated denials of espionage, the Attorney General of the United States publicly accused him of espionage (R. 16-17) (Hearings before Subcommittee to Investigate the Administration of the Internal Security Acts and other Internal Security Laws, Committee on the Judiciary, United States Senate, 83rd Congress, 1st Sess., on Interlocking Subversion in Government Departments, Part 16, pp. 1110-1141 (1953)). Petitioner's affidavit shows that the Attorney General has made a major political issue of this espionage charge and that petitioner's sworn denial today of the accusation might well lead to his unfounded indictment for perjury (R. 8, 18, 22).

The government introduced no evidence in denial of petitioner's charges or otherwise in support of the application (see R. 6-28). The District Court denied petitioner's ap-

quest that it examine the grand jury minutes to determine whether the grand jury had any evidence of espionage whatsoever or was otherwise making a bona fide investigation into crime (S. M. 76).*

Instead, on February 1, 1955, District Judge Weinfeld rendered a decision sustaining the constitutionality of the statute, holding that the court played no part in the grant of immunity and that the government was under no duty to produce evidence in support of its application (R. 28). He also overruled the additional constitutional and other objections made by petitioner to certain of the questions.

The District Court order, entered on February 8, 1955, made no findings of fact with respect to the necessity or propriety of the testimony (R. 44). It directed petitioner to appear and to answer pursuant to the statute, not only the questions set forth in the application, but all other questions on the same subject. The court did not make an explicit grant of immunity in its order nor did it indicate even in the most general terms the scope of the immunity which the witness, thus compelled to testify, was to receive.

On March 8, 1955, petitioner again declined on the ground of his constitutional privilege to answer the questions put to him by the grand jury. He was thereupon convicted of contempt by District Judge Murphy. The court entered judgment sentencing him to six months' imprisonment with the right to purge (R. 53).

The Court of Appeals affirmed the conviction, each judge writing a separate opinion (R. 55-60). These opinions indicated that the court felt itself bound by this Court's decision in *Brown v. Walker*, 161 U. S. 591, although as an original proposition it would have decided the matter in favor of petitioner, especially in view of the factual situation herein presented.

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* S. M. refers to the stenographic record of the hearing before Judge Weinfeld which by agreement of counsel was before the Court of Appeals. It will be filed with this Court.

Summary of Argument

This statute, as Chief Judge Clark said below, "undermines and so far forth nullifies one of the basic differences between our justice and that of the systems we condemn, namely, the principle that the individual shall not be forced to condemn himself" (R. 59). It represents a "precipitate" stage of the erosion to which the Fifth Amendment has been subject in recent years (*id.*).

The constitutional privilege arose in the 17th Century in the attempt to protect religious and political dissent. The comparable intolerance and repression of this past decade requires the fullest application of the privilege.

This Court has upheld laws purporting to exchange immunity for the constitutional privilege. However, those cases involved the regulation of business rather than political or religious opinions and beliefs, the original occasion for the privilege. Now that this problem has reappeared, the Constitution should be read literally, and construed liberally to meet it.

1. It may reasonably be argued that the Constitution must be literally construed and that no person may be required to give evidence against himself regardless of the considerations and protections offered. This view has the practical merit of giving complete protection to the witness and of not making his safety depend upon his future ability to prove the receipt, scope and application of the immunity grant. It is particularly appropriate where First Amendment rights, which the privilege was intended to protect, are affected.

2. In any event the immunity offered by the Immunity Act of 1954 involved is fictitious because it is not coextensive with the privilege, the irreducible condition of validity. The statute disregards and fails to give protection against the

numerous criminal, civil and economic sanctions imposed upon the dissenter.

The statute exposes the witness to public infamy and the sanctions resulting therefrom. This is a far cry from the hypothetical disgrace of the auditor in *Brown* v. *Walker*. The present victim is a political dissenter whose home, job, insurance, trade-union membership, and community status may be lost by his revelations.

3. The statute subjects the witness to the hazards of a perjury prosecution based upon his compelled testimony. In the last decade perjury prosecutions have become a standard method of punishing political dissenters not susceptible of prosecution under substantive laws. The widespread use of political informers of recognized unreliability and the lack of preciseness in the subjects of interrogation create a very real danger for the witness.

4. The very act of association against which this statute is directed is a continuing one. The compelled testimony will facilitate criminal prosecutions for conduct subsequent to the testimony.

5. The Immunity Law subjects the witness to state criminal prosecution. Even if Congress had intended to give complete immunity against state prosecution, this intention could not be carried out since the federal investigatory power cannot nullify substantive state legislation. The cooperation between state and federal governments in the field of "subversive activities" and the increasing state and local regulation of this subject make the danger from the states a very real one for the federal witness.

6. The statute was misread by the courts below when they agreed that the Attorney General rather than the court grants immunity. Congress rejected an administration bill giving this power to the Attorney General and passed a law

transferring this power to the District Court. The statute is therefore unconstitutional since the grant of immunity is not a judicial function. However, should this Court hold otherwise, the order must be reversed since (1) the District Court accepted as binding upon it the Attorney General's decision to grant immunity, and (2) the only record was that made by petitioner who showed that the investigation was in bad faith and that he might be prosecuted for perjury.

8. Even if the grand jury section of the statute were not objectionable for the foregoing reasons, it would fall as part of an otherwise invalid statute. The other section relating to congressional committees clearly presents no case or controversy. Congress would not have passed one section without the other.

9. The order below is invalid because it permits an inquiry into political affiliations which are irrelevant to a bona fide espionage investigation and which are protected by the First Amendment.

10. Finally, the order fails to comply with the statute and to give adequate protection to the witness because it neither contains a grant of immunity nor states what immunity is given to the witness.

Argument

POINT I

The statute is unconstitutional in that it compels a witness to testify against himself.

The history, purposes and policy of the privilege have been too often told for repetition here. *Quinn* v. *United States*, 349 U. S. 155 (1955); *Boyd* v. *United States*, 116

U. S. 616 (1885); *Twining v. New Jersey*, 211 U. S. 78 (1908).*

It is sufficient to recall that in England, the privilege emerged in response to the oath *ex officio* employed by the Star Chamber and by the High Commission in political and religious persecutions respectively. The problems were the same, for beginning with Henry VIII "the distinction between church and state, between heresy and treason, between non-conformance and sedition becomes increasingly obscure" (Siebert, *Freedom of the Press in England, 1476-1776* (pp. 48-49) (1952)). James I recognized this with his "No Bishop, No King". (Davies, *The Early Stuarts*, p. 68, (1949)).

The reason for the privilege is dramatized by Charles I's letter to the High Commission charging that the Puritans had "withdrawn themselves from their Obedience to our Ecclesiastical Laws, into several ways of Separation: Sects, Schisms, and Heresies" and had "grown to that obstinacy and disobedience, that some of them refused to take their Oath, and others being sworn, refuse to answer . . . ." (1 Hazard, *State Papers*, 428).

That dissent is the context of the privilege is shown by Coke's writs of prohibition against the ecclesiastical courts and his strictures against the oath *ex officio*, *Edwards' Case*, 13 Co. Rep. 9, 77 Eng. Rep. 1421 (1609); Oaths *Ex Officio*, 12 Co. Rep. 26, 77 Eng. Rep. 1308; by the historic prosecution of John Lilburn for seditious books resulting in abolition of both Star Chamber and High Commission (3 How. St. Tr. 1315 (1637); 8 Wigmore, *Evidence* (3d Ed. 1940) sec. 2250); by the Declaration of the Army, during the Puritan Revolution, against the oath *ex officio* (Pittman, *supra*,

* See particularly: Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England* (Essays in History and Political Theory in Honor of Charles Howard McIlwain) 1936; Pittmann, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Virginia Law Review 725 (1935).

at 773); and by the repeated assertion of the privilege in the state trials which occurred during and after the Revolution. *E.g., King Charles' Trial*, 4 How. St. Tr. 993, 1101 (1649); *Scroggs Trial*, 5 How. St. Tr. 1034, 1039 (1660).

In this country, the privilege likewise emerged in opposition to the established church and political authority. Thus, for example, examinations in Governor Andros' court were criticized as "unreasonably strict, and rigorous and very unduely ensnaring" (*Narratives of the Insurrections* (1691) 246). The privilege was asserted by Thomas Maule who was charged with publishing seditious matter against the clergy (1 Chandler, *Criminal Trials*, 141, 144) and by William Bradford charged with printing the Pennsylvania charter (Wallace, *Trial of William Bradford*, p. 49).

It must therefore be recognized in construing the constitutional privilege that its purpose was in a very real sense the protection against Church and State of the freedoms which today we call First Amendment rights.* This Court has recently noted "the close relationship between the First Amendment and the privilege against self-incrimination." *Quinn* v. *United States*, supra at ftn. 31. This is not to say that it is to be limited to the protection of such rights, but that its most liberal construction is required in such cases.

The Fifth Amendment to the Constitution of the United States provides that "No person * * * shall be compelled in any Criminal Case to be a witness against himself." We should have read this language to mean that compulsory testimony is prohibited, regardless of the considerations offered, and that, while a voluntary arrangement to testify in return for immunity may be valid and enforceable, it

* Similarly with respect to the Fourth Amendment whose origins are found in the fight of Wilkes for a free press. It is significant that this Court has read the constitutional privilege of the Fifth Amendment and the search and seizure provisions of the Fourth together *Boyd* v. *United States*, 116 U. S. 616 (1885).

way not be compelled. In the words of Judge Gaston in the Court below, it is "a circuitous attempt to circumvent the Constitution by a short-cut legislative statute amending the Fifth Amendment". (R. 60).

This was the view of four justices of the Supreme Court, dissenting in *Brown* v. *Walker*, 161 U. S. 591, 610 (1896). The first dissenting opinion states:

> "It is too obvious to require argument that, when the people of the United States, in the Fifth Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his right thereto should not be divested or impaired by any act of Congress."

More recently, Senator Hoey, in opposing the Immunity Bill said:

> "I am opposed to the entire bill. I believe we are going right in the face of the Constitution. The Constitution of the United States provides that no person shall be required to testify against himself. * * * We are granting to a committee of the Congress the power to take away the constitutional guarantees and rights to the protection which the Constitution gives us. We are saying, 'When you come before a committee and we grant you immunity, you have got to testify.' The Constitution says a man does not have to do that. I do not believe Congress ought to pass a measure such as the one which is before us. * * * " (99 Cong. Rec. 8352.)

However, since this Court upheld a federal immunity statute in *Brown* v. *Walker*, 161 U. S. 591, it is incumbent upon us to look into the reasons for the failure to give a literal interpretation to the language of the Fifth Amendment. That case involved issues so remote from those which gave rise to the privilege that it presented a most unsatisfactory basis for the enunciation of a great constitutional principle. It involved no questions of political or

religious dissent, but the enforcement of the Interstate Commerce Act. The background of that statute has been well described by Prof. Swisher:

> "By chartering companies, making grants of land, and lending money, Congress stimulated the construction of railroads, and, in seeking to protect the interests of the public in railroads built partly by means of public credit, it sought to exercise over such railroads control broader in scope than that then exercised over other railroads. * * * For the first time since the lapsing of the charter of the second Bank of the United States, in 1836, the government competed for power with corporations able effectively to challenge its authority." (*Swisher, American Constitutional Development*, 2d Ed. (1954), 389.)

But "[l]ittle concern for the public interest marked the use of government funds" (id., 391). As a result, Congress established an investigatory commission to look into the management of all the railroads that had received aid from the government in bonds.

> "The investigating commission * * * disclosed the systematic lootings of the railroads in question over a considerable period of years. Huntington, Stanford, Jay Gould, and many other prominent railroad men * * * gave testimony. But in spite of the facts disclosed by the testimony, witnesses were extremely reticent as to matters likely to prove embarrassing. Memories failed at convenient points, and records were conveniently missing" (id., 393-4).

Enforcement of the Interstate Commerce Act was therefore thought to require use of the existing Immunity Law, the Act of February 25, 1868, Rev. Stat. sec. 860. This law was declared unconstitutional in *Counselman v. Hitchcock*, 142 U. S. 547 in 1892 because it permitted prosecution with respect to the subject matter of the compelled testimony. Accordingly, Congress the following year upon the request of the Interstate Commerce Commission passed the Compulsory Testimony Act, 27 Stat. 443 (1893), 49 U. S. C. Sec. 46 (*Swisher, supra*, pp. 417-418). This law was up-

held in *Brown* v. *Walker*, by a majority of five on the ground that if the privilege were applicable, "the enforcement of the Interstate Commerce law or other analogous acts" would become impossible (161 U. S. 591, 610 (1896)).

The witness in *Brown* v. *Walker* was the auditor of the Alleghany Railway Valley Company, a railroad which was suspected of giving rebates or preferential rates to the Union Coal Company in violation of the Interstate Commerce Act. The witness was not an officer of either corporation or otherwise suspected of wrongdoing. It was obvious to the Court that he was in no personal danger of prosecution for crime, that he was attempting to protect his corporate employer and that there was no moral obloquy attached to the violation of the new regulatory law.

The cases that immediately followed *Brown* v. *Walker* involved the regulation of commerce and trade and in none did the court make an evaluation of first principles independent of *Brown* v. *Walker* (see e.g. *Hale* v. *Henkel*, 201 U. S. 43 (1906), *Wilson* v. *United States*, 221 U. S. 361 (1911)).

We believe that this Court erred in *Brown* v. *Walker* but that the error was understandable. It was upholding the regulation of corporate enterprise which was regarded as a competing government threatening to control our economy. The same problem led the Court shortly thereafter to deny the constitutional privilege to these business enterprises because of their corporate form. *Hale* v. *Henkel*, *supra*, a decision not followed in England, *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass*, 108 L. J. K. B. 562; 2 K. B. 395, 409 (1939).

The present case and the present statute require the application of totally different standards (cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, fn. 4 (1938)). The statute refers to "treason, sabotage, espionage, sedition, seditious conspiracy", the very type of criminal matters that gave rise to the privilege. In the light of recent

developments, the words of Judge Grosscup, who declared unconstitutional the Compulsory Testimony Act of 1893, take on a prophetic ring:

> "Happily, the day when this immunity is needed seems to be over. It is difficult for us, who live in a time when there are few, if any, definitions of crime that do not meet with the approval of universal intelligence and conscience, to appreciate these conceptions of our fathers. The battle for personal liberty seems to have been attained, but, in the absence of the din and clash, we cannot comprehend the meaning of all the safeguards employed. When we see the shield held before the briber, the liquor seller, the usury taker, the duelist, and the other violators of accepted law, we are moved to break or cast it aside, unmindful of the splendid purpose that first threw it forward. But, whatever its disadvantages now, it is a fixed privilege, until taken down by the same power that extended it. It is not certain, either, that it may not yet serve some useful purpose. The oppression of crowns and principalities is unquestionably over, but the more frightful oppression of selfish, ruthless, and merciless majorities may yet constitute one of the chapters of future history. In my opinion, the privilege of silence, against a criminal accusation, guaranteed by the fifth amendment, was meant to extend to all the consequences of disclosure." *United States* v. *James*, 60 Fed. 257, 264-5 (1894).

The privilege, as we have seen above, was intended to protect freedom of speech and creed. The Fifth Amendment thus buttresses the First. The present statute, by compelling testimony in areas protected by the First Amendment violates the latter. If persons can be compelled to testify to their dissident beliefs and unpopular associations, a normal sense of caution will induce them to refrain from both, thus surrendering their First Amendment rights.

A return to the literal meaning of the Fifth Amendment is required, at least in cases of this type, if the privilege is to retain any of its original meaning and vigor. We need

not remind the Court that the privilege is more than a personal right, that it is the foundation of our accusatorial system of justice. It protects the individual against the collective power of the state. Indeed, it does more, for it reflects an ethical judgment, a revulsion against the self-degradation that comes from compulsory confession of non-conformity. This was well expressed by the leading protagonist in the development of the privilege:

> "* * * there was an inquisition Oath tendered unto me (which I refused to take) on four several days; the sum of which oath is thus much: 'You shall swear that you shall make true answer to all things that shall be asked of you: so help you God!' Now this oath I refused as a sinful and unlawful oath * * *. It is an oath against the law of the land * * *: And also it is expressly against the Petition of Right, an act of parliament enacted in the 3d and 4th year of our king. Again, it is absolutely against the law of God; for that law requires no man to accuse himself; but if anything be laid to his charge, there must come two or three witnesses at least to prove it. It is also against the practice of Christ himself, who, in all his examinations before the high priest, would not accuse himself, but upon their demands, returned this answer, 'Why ask you me? Go to them that heard me'." *The Trial of John Lilburn and John Wharton*, 3 How. St. Tr. 1315, 1331-2 (1637).

POINT II

The statute is unconstitutional in that it exposes the witness and his family to irreparable injury beyond anything contemplated in *Brown* v. *Walker*.

The Immunity Act of 1954 involves political crime and that in a period in which the political dissenter is subjected to social, economic, physical or other injury beyond the conception even of our forefathers. One would indeed have to be that "blind" court * not to take judicial notice

* *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 37 (1922).

of the destruction of civil liberties this past decade. That too is why *Bryan v. Walker* does not answer petitioner's attack upon this statute. For the auditor in that case could resume his job the day after testifying before the grand jury, his personal safety not threatened, his reputation and community status unaffected, his children unharassed in schooling, home or playground.

The problem is very different today for the political dissident because of the climate of public opinion and the punitive sanctions operating against him. Today, with rare exceptions based upon wealth or other special circumstances, he is at the mercy of an increasingly closed society, in a sense unknown to earlier generations of Americans. He is literally faced with the problem of survival because so many areas of employment and living are controlled by government and other powerful institutions able to enforce rigid standards of conformity.

It is for this reason that the Immunity Law promises more than it can give. It fails to give true immunity in three principal sectors of our national life—that controlled by the federal government, that under local government influence and that in which so-called private groups dominate the individual's existence. As Chief Judge Clark said of this law below:

> "It undermines and so far forth nullifies one of the basic differences between our justice and that of systems we contemn, namely the principle that the individual shall not be forced to condemn himself. Practically, as we know, no formal immunity can protect a minority deviator from society's dooms when he departs from its norms" (R. 59).

A. Federal disabilities.

The Internal Security Act (64 Stat. 987 (1950), 50 U. S. C. Secs. 784, 785), and various federal executive orders prohibit the employment of so-called subversives in government or defense facilities and make it unlawful for

them to apply for or use passports. If the President declares the existence of "an internal security emergency", the Attorney General can intern anyone as to whom "there is reasonable ground to believe that such person will probably engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage". (50 U. S. C., Secs. 812, 813).

Employment as a longshoreman or in the privately-owned merchant marine is subject to governmental screening (64 Stat. 427 (1950); 50 U. S. C., Sec. 191). Since June 1954, the Defense Department has promulgated an elaborate series of security regulations directing the discharge of inductees under less than honorable conditions for associations antedating their induction. (See, e.g., Department of the Army, Special Regulations, S. R. 600, 220-1).

Even officials of international organizations, such as the United Nations, have been subjected, as American citizens, to investigations by an International Organizations Employees Loyalty Board, created by Executive Order 10459, 18 F. R. 3183, June 4, 1953.

The sanctions are not limited to governmental employees. The Federal Communications Commission has proposed a rule that operators in broadcasting stations pass loyalty tests (Federal Communications Commission, Docket Nos. 11060-61). It has withheld a broadcasting station license on political grounds. (Kenyon, *Politics in the Lamb Case*, 181 The Nation 12 (1955).

The use of grants for research to university professors has added another sector to federal control with implications so serious that at least one university will not accept such grants.

A recently enacted statute deprives of citizenship persons convicted of Smith Act violations (68 Stat. 1146, 8 U. S. C., Sec. 1481 (1954)). This may be the precursor of similar sanctions applied to persons compelled to make such admissions to congressional committees and grand juries.

It may reasonably be estimated that at least 15 million people are directly affected by security regulations imposed by the federal government.

Obviously the immunity statute was not intended to and cannot relieve of these disabilities those who testify pursuant to its provisions. This point indeed was made by the minority of the House Committee on the Judiciary (H. Rep. 2606, 85d Cong. 2d Sess., p. 12). The Act was not intended to make admissions of Communist Party membership before a grand jury a key to passport eligibility, to employment in the government or in defense facilities, to broadcasting station licenses, to retention in the armed forces and to freedom from concentration camps. It was not intended to permit such witnesses to remain officers of labor unions and to permit such unions to use the facilities of the National Labor Relations Board. (See Labor Management Relations Act, 1947, 61 Stat. 136, 146 *et seq.*, 29 U. S. C. 141, 159(h).)

In all candor the Government must concede that all of the disabilities created by statute and regulation will continue despite the testimony under the alleged protection of the statute. Therefore, true immunity was not intended nor can it be given by the law.

B. State disabilities.

We discuss below in Point IV the constitutional problems arising from state criminal prosecution. In addition, there are state laws and municipal ordinances (a) requiring communists to register, (b) requiring state and city teachers and other employees to take loyalty oaths, and (c) subjecting state and city employees to investigation and discharge for political reasons. There are legislative investigations in imitation of those of the House Committee on Un-American Activities. (See Emerson and Haber, *Political and Civil Rights in the United States*, 1952, pp. 568-600.)

The total punitive impact of these local regulations and investigations upon the witness compelled by federal au-

thority to testify is truly terrifying. Since the witness' admissions of political guilt may be the prelude to similar local subpoenas, test oaths and loss of employment, he is receiving a meaningless "immunity". He has in fact surrendered his right to local employment and his freedom from local harassment precisely because of such revelations. This dilemma points up the mockery of the "immunity" concept in relation to "subversive activities" today.

C. Private disabilities.

In addition to the formal governmental sanctions, those exercised by the community and by private groups are so tremendous as to challenge attempt at brief discussion. They include expulsion from labor unions, loss of private employment, discrimination in housing and schooling and public opprobrium. This Court's conception of trade unions as public utilities, thus required to file non-Communist affidavits in return for governmental favors, *American Communications Ass'n* v. *Douds*, 339 U. S. 382 (1950), and the Communist Control Act's even more drastic conception of unions as instruments of the state (68 Stat. 775, 777, 50 U. S. C. Sec. 841, *et seq.*) has turned the loss of union membership from a private to a public sanction. It brings us beyond the warnings of Professor Hale against those private groups who exercise governmental power (Robert G. Hale, *Freedom Through Law* (1952)).

Automobile owners have found their insurance cancelled, parents have been removed from activity in parent-teacher associations, houses have been stoned, the custody of children has been determined in recent lawsuits by the politics of their parents. Are these to be dismissed as "private" sanctions?

If the privilege is to have any meaning in the current context, these sanctions *must* be regarded as reason for invoking the privilege. In an analogous period of religious oppression, the 18th Century, the English equity courts allowed witnesses to be silent where admissions of papacy would result in property loss. *Harrison* v. *Southgate and*

Mordaunt, 2 Ves. Sen. 389, 28 Eng. Rep. 249, 252 (Ch. 1751), or where ecclesiastical censure would follow, *Finch v. Finch*, 2 Ves. Sen. 492, 28 Eng. Rep. 315 (Ch. 1752), or where a parliamentary seat was at stake, *Honeywood v. Selwyn*, 3 Atk. 276, 26 Eng. Rep. 961 (Ch. 1744).

Where the effect of political heresy is as serious as it is today, the dissenter is subject to penalties and forfeitures which are more drastic than criminal prosecution. This is not the place for a complete review of the private employment opportunities of a political dissenter in the present political atmosphere. It is sufficient to say that employment in the entertainment industry, in a private educational institution, on a newspaper, in the advertising industry, as a longshoreman, and in many other occupations, is effectively closed. Only the most menial and low-paying work is now available to many persons who have been branded as subversive by congressional committees, administrative agencies, or the daily press. Indeed, it might well be said that to many such persons the threat of criminal prosecution is the least of their concerns. (See Note, 63 Yale L. J. 954 (1953).)

The situation is radically different from the purely theoretical issue of public disgrace considered irrelevant by a majority of this Court in *Brown* v. *Walker*. We are dealing here with what one writer, discussing a similar period in the history of another country, calls "the tyranny of public opinion" a phenomenon in which the victim "risks being rejected by his own community and being expatriated in his own country." (Halasz, *Captain Dreyfus* (1955) 124.) This is indeed the revival of the institution of *infamia* in Roman and Canon law. (Mitchell Franklin, *Infamia and Constitutional Civil Liberties*, 14 Lawyers Guild Review 1 (1954); Vincent N. Tatarczuk, *Infamia at Law*, Canon Law Studies No. 357, Cath. Univ. of Amer. Press, 1954; Frank J. Redlinger, *The Canonical Effects of Infamia of Fact*, Canon Law Studies No. 353, Cath. Univ. of Amer. Press, 1954).

POINT III

Even the danger of federal criminal prosecution remains.

Our previous point discussed injuries not strictly criminal in nature, although even there the registration and oath provisions of current day security regulations make the distinction a doubtful one. However, there are two areas in which the operations of the Immunity Act will facilitate rather than foreclose federal criminal prosecutions.

A. The continuing crime.

The first problem arises from the constant use of the conspiracy concept in prosecutions for political crime despite the cogent judicial warnings against that weapon (Mr. Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, 445 (1949)). In these cases it is standard practice to introduce evidence long antedating the overt acts for the purpose of showing the development of the conspiracy (*Dennis* v. *United States*, 341 U. S. 494 (1951), affirming 183 F. 2d 201). The witness who is compelled, as here, to testify to such distant conduct may anticipate that it will be used against him, directly or indirectly, in a prosecution for violation of law occurring subsequent to his testimony. Surely the government is not granting him immunity against prosecution for *future* violations of law. *United States* v. *Kahriger*, 345 U. S. 22 (1953). Indeed, witnesses under immunity acts have been subsequently prosecuted for continuing crimes upon the basis of leads given by their compelled testimony and otherwise. *United States* v. *Smith*, 206 F. 2d 905 (C. A. 3, 1953); *United States* v. *Stifft*, 186 F. 1002 (N. D. Ill. 1911); *United States* v. *Frontier Asthma Co.*, 69 F. Supp. 994 (W. D. N. Y. 1947); *contra, United States* v. *Moore*, 15 F. 2d 593 (D. C. D. Ore. 1926). And can it be denied that his revelations as

to the past may be useful to the prosecution either as a reason for keeping him under surveillance and thus obtaining "leads" to be used against him, or as background evidence in a future prosecution?

No one can reasonably seek immunity from prosecution for future crime. There is no comparable problem in cases involving commercial crime such as tax evasion. The witness there knows what he is doing when he leaves the witness stand to file another false tax return. That is not true of the witness before a grand jury investigating violations of the Smith Act, 54 Stat. 670-671, 18 U. S. C. 2385, the Foreign Agents Registration Act, 52 Stat. 631, 22 U. S. C. 611, and the like. A sharp line cannot be drawn between a man's political ideas and associations before and after his testimony. The line between the permissible and the forbidden is always uncertain in the realm of ideas and advocacy. The witness cannot know until a jury's verdict tells him so that his conduct violated a statute of this type. His earlier testimony does not immunize, it immobilizes him. If he is to have safety after his testimony, he must refrain from writings, speeches and associations that might be construed as criminal. The Immunity Law becomes a censorship law. It is the return to prior restraint, a noxious doctrine we had thought long behind us.

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*We are reminded of this by a striking passage in Waldo Frank's biography of Simon Bolivar which relates the attack by a Spanish general upon the revolutionists:

> "Monteverde moved into Caracas and at once broke all the promises he had signed so lightly because he did not intend to keep them. Republicans were imprisoned and shot, properties were seized, the port of La Guaira was closed, no one could leave. To injury the Spaniard added insult of sophistication. He had agreed to punish no one for his political opinion. This held to the moment of *signing*, but what of *the moment after*? What if the heretics and traitors continued to think? For this, now, they should be punished. He had promised to enforce the Constitution of Cadiz. It gave no rights of citizenship to *criminals*. Venezuelans were criminals, *ergo* [illegible]." (Frank, *Birth of a World* (1951) 62)

B. The perjury prosecution.

The witness compelled to testify under this statute subjects himself to the very real danger of prosecution for perjury based upon his compelled testimony. The statute expressly leaves him open to such a prosecution and in that respect denies him his constitutional privilege.

This has not generally been regarded as a ground for preserving silence. (see *Glickstein v. United States*, 222 U. S. 139 (1911)). However, a more beneficent rule must apply in the field of political crime if the privilege is not to prove a cruel hoax. For these problems are very different from those in the field of commercial or other crime. As Chief Judge Clark said below:

> "And realistically viewed there is much in the defendant's contention, that at the end of the road is a charge of perjury supported by the oath of a renegade or paid informer" (R. 605).

There is historical support for the contention herein made. The proceedings of the Bishops of Lincoln and Worcester for requiring men to take the oath were based upon the "danger of perjury by forcing them to answer on oath in regard to the secret private actions and opinions of others wherein they might easily be mistaken." Maguire, *supra*, p. 206; Morgan, E. M., *The Privilege against Self-Incrimination*, 34 Minn. Law Rev. 1, 3 (1949).

Similarly, Coke pointed out that "laymen for the most part are not lettered, wherefore they may easily be inveigled and entrapped and principally in heresy and errors of faith." * * *" *Oaths Ex Officio, supra.* Thomas Lidd's case shows the use made of perjury charges in connection with the oath *ex officio*. He testified before an ecclesiastical court after objecting to the oath and then was charged before the High Commission with perjury. There he was imprisoned for refusing to take the oath. The Kings Bench issued a writ of habeas corpus "on the grounds that the

High Commission had no right to force men to accuse themselves on oath or to inflict the temporal penalties of fine and imprisonment." Maguire, *supra* at 225, citing *The Argument of Master Nicholas Fuller in the Cases of Thomas Udall and Richard Maunsell, his Clients*, 1697).

It has also been objected that the oath *ex-officio* "would place a witness under the strongest temptation to commit the crime of perjury . . . ." (Starkie, *Evidence*, 19th Amer. Ed., 40-41). Chancellor Walworth of New York has said:

> "I may be permitted to doubt whether it is strictly consistent with the spirit of our institutions and of an enlightened legislation, to tempt the conscience of any man so far as to compel him to make a disclosure . . . " (of usury for which immunity was given).
>
> *Perrine v. Striker*, 7 Paige 598, 601 (1839).

Professor Mitchell Franklin has suggested that the Fifth Amendment owes much to the encyclopedist movement in eighteenth-century France (Franklin, *The Encyclopédiste Origin and Meaning of the Fifth Amendment*, 15 Law. Guild Rev. 41 (1955), 53-55). If this be so, it is another point where the struggle against the oath involved a concern for perjury. "Let the oaths or rather the perjuries required from the accused be suppressed" said the *Cahier du Tiers* (Esmein, *A History of Continental Criminal Procedure* (1914) 398).

The government will argue that every witness must assume that he will not be prosecuted for truthful testimony, and that if he is prosecuted, he is reasonably assured of an acquittal. We challenge this argument, even in its general form, for the reasons given by the dissenting justices in *Brown v. Walker*:

> "His position in this respect is not that of ordinary witnesses testifying under the compulsion of a subpoena. His case is that of a person who is exempted by the Constitution from testifying at all in the matter. He is told, by the act of Congress, that he must never-

> theless testify, but that he shall be protected from any prosecution, penalty or forfeiture by reason of so testifying. But he is subjected to the hazard of a charge of perjury, whether such charge be rightfully or wrongfully made. It does not do to say that other witnesses may be so charged, because if the privilege of silence, under the constitutional immunity, had not been taken away, this witness would not have testified, and could not have been subjected to a charge of perjury" (*supra* at 622).

However, the government must concede that in political cases there is an overwhelming danger of a perjury prosecution. It is standard operating procedure for the government to prosecute for perjury persons whom it desires to but cannot prosecute for such crimes as espionage, sedition and the like. The Taft-Hartley law has been a fruitful basis for this type of prosecution of union officers. Witnesses have been called before congressional committees and grand juries for the apparent purpose of prosecuting them for perjury in denying the serious charges against them. Three famous prosecutions should be enough to prove our point. *United States* v. *Hiss*, 185 F. 2d 822 (C. A. 2, 1950), *cert. den.* 340 U. S. 948; *United States* v. *Remington*, 191 F. 2d 246 (C. A. 2, 1951), *cert. den.* 343 U. S. 907 (1952); *United States* v. *Lattimore*, 215 F. 2d 847 (App. D. C., 1954).

Indeed, in an investigation of United Nations personnel, conducted by a federal grand jury in the Southern District of New York, an assistant United States District Attorney stated:

> "* * * In this particular case an indictment was not possible right then for various reasons, namely Kaplan had refused to testify so there was no testimony which you could attack from a perjury standpoint as far as espionage was concerned." (Hearings before the Special Subcommittee to Investigate the Department of Justice, House Committee on the Judiciary, on H. Res. 95, 82nd Cong. 2d Sess. (1952) 1655.)

It is not as if our tripartite system of government were smoothly functioning, with grand juries investigating crime and congressional committees determining the need for legislative action. Each has subpoenaed union officials on the eve of union elections with the obvious intention of affecting the election results by newspaper publicity concerning the attempt. One attack by a grand jury in the Southern District of New York has led to the judicial censure and expungement of its presentment. *Matter of United Electrical and Radio Machine Workers of America*, 111 F. Supp. 858 (S. D. N. Y. 1953). One appellate court has recently suggested that it is improper for the grand jury to subpoena an intended defendant. *Powell v. U. S.*, App. D. C. No. 12463 (1955). This rule would permit of ready extension to the perjury cases where the element of entrapment is even clearer.

This misuse of these systems of interrogation make an unfounded prosecution for perjury a real danger which is increased by the widespread use of informers and the vagueness of such terms as membership, associations, and belief in the area of political crime.

The prevalent use of informers and their unreliability in political cases is too well established for discussion here. Informers have always been recognized as a danger in political prosecutions. A whole flock of informers arose in connection with the enforcement of the Test Oaths of 1606 and 1610 directed against the Catholics and the Licensing Act of 1662 directed against the Puritans (Ryan, *The Jacobean Oath of Allegiance and English Law Catholics*, 28 Cath. Hist. Rev. 159 (1942); Green, *A Short History of the English People* (1879) 610; Koeningsberg & Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 Lawyers Guild Review 111 (1951)).

Historians have long discussed the danger of informer testimony (see *e.g.*, 2 May, *Constitutional History of England* (1863) 277)). The commentators in increasing volume

today have reflected the seriousness of the problem (see particularly Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs*, 60 Yale L. J. 1090 (1951)).

The damage done by informers is reflected in recent decisions which have set aside Smith Act convictions or refused orders of deportation. *United States* v. *Flynn*, 30 F. Supp. 413 (S. D. N. Y., 1955); *United States ex rel. Brzozicki* v. *Helton*, 222 F. 2d 840 (C. A. 7, 1955).

The subject matter of the inquiry creates an additional danger for the witness in political cases. One obvious trap lies in the kind of detailed information, often lying in the depths of the past, which is asked of witnesses in political cases. See *United States* v. *Lattimore*, *supra*.

In addition the inquiry relates to such matters as membership, belief, and affiliation. Thus, Owen Lattimore was indicted for his denial that he was a "sympathizer" of the Communist Party, and Harvey O'Connor was indicted for refusing to answer so vague a question as whether he had "ever been a member of the Communist conspiracy" (*U. S.* v. *O'Connor*, D. C. Crim. No. 1650-53). The Court of Appeals for the Ninth Circuit has held that in a criminal prosecution for perjury in denying Communist Party membership, Harry Bridges' views on trade with China were proper evidence of such membership for the jury. *Bridges* v. *United States*, 199 F. 2d 811, 839, ftn. 9 (C. A. 9, 1952), rev'd 346 U. S. 209 (1953). The Taft-Hartley Law requires union officers to execute affidavits that they do not *believe* in the overthrow of the Government (61 Stat. 136, 29 U. S. C. Supp. I, 141 *et seq.*) (1947). One union official has already been convicted of perjury for denying membership after he openly resigned, the Government's theory being that resignations are not possible (*Gold* v. *United States*, App. D. C. No. 12352, appeal pending). Another union official was acquitted of the charge of membership and found guilty because he was still "affiliated" with the Com-

munist Party (see *United States* v. *Bryson*, 16 F. R. D. 477).

All this points up the necessity of permitting silence in a period when beliefs and acts of association are considered relevant to public inquiry and a basis for prosecution.

POINT IV

The statute does not give complete immunity because the witness is subject to prosecution for state crime.

When the Senate passed S. 16 on July 9, 1953, it was of the opinion that it was not required to, could not and did not intend to give immunity for state prosecution of crime (99 Cong. Rec. 4743, 8340-8357). However, the House Committee on the Judiciary had a different view. It believed it desirable to give immunity from State prosecution. It was not sure that it could do so. It nevertheless wrote a statute which it hoped was broad enough to achieve this effect. It is doubtful whether the statute, as written, achieves this objective. In any event, it is certain that it could not constitutionally do so.

The Committee stated:

> "The answer to the precise question is not too clear. See *Brown* v. *Walker*, *supra*; *Counselman* v. *Hitchcock*, *supra*; *Hale* v. *Henkel* (201 U. S. 43 (1906)); *U. S.* v. *DiCarlo* (102 F. Sup. 597 (N. D. Ohio 1952); *Adams* v. *Maryland*, *supra*. In any event, the question can only be resolved by a decision of the Supreme Court. *Even though the power of Congress to prohibit a subsequent State prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill.* The language of the amendment that 'no such witness shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so

compelled to testify, after having claimed his privilege against self-incrimination, to testify or produce evidence, *is sufficiently broad to bar a subsequent State prosecution if it be determined that the Congress has the constitutional power to do so.* In addition, the amendment recommended provides the additional protection as set forth in the Adams case, by outlawing the subsequent use of the compelled testimony in any criminal proceeding—State or Federal.

"By the use of these two distinct concepts, the committee believes that the fullest protection that can be afforded the witness will be achieved." (Emphasis supplied.) (H. Rep. 2606, 83rd Cong., 2d Sess., p. 7.)

A. Read literally, the statute does permit state prosecution.

The proponents of immunity legislation will concede that its validity depends upon immunity both from use of the compelled testimony and prosecution on the subject of the testimony. *Counselman* v. *Hitchcock*, *supra*.

The instant law appears on its face to treat these two problems differently, in so far as state prosecutions are concerned. Section (c) seeks to immunize the witness against the use of his testimony in state criminal proceedings. However, it does not immunize the witness against prosecution in a state court in which the testimony itself is not used. For the term "in any court" relates only to the use of the testimony and not to the forum of prosecution. It continues that aspect of the statute which existed prior to the 1954 amendment, which was upheld in *Adams* v. *Maryland*, 347 U. S. 179 (1954).

The District Court was of the opinion that the statute granted immunity against State prosecution for crime (R. 35). Its reliance upon *Brown* v. *Walker*, *supra*, is certainly misplaced, since the statute there involved lacked the dichotomy found in the Immunity Law between the use of the testimony itself and a prosecution on the same subject, and the Supreme Court's remarks on this point certainly were pure dictum. Secondly, it is significant that the Sen-

ate, in its extensive earlier debates on S. 16, rejected the thought of immunity against State prosecutions (99 Cong. Rec. 4742-3). When H. R. 6899 reached the Senate a year later, it never went through the Senate Judiciary Committee and was summarily handled upon the floor without any repudiation of the earlier view. While it is true that the new bill contained language different from the old, its language is at best ambiguous and it is doubtful that so great a reversal of position was intended by the Senate without a single word of explanation.

Adams v. *Maryland*, *supra*, did not grant immunity against State prosecution for crime and therefore does not support the court below. The concurring opinion of Mr. Justice Jackson emphasizes the limitation of the holding.

The clarity found by Judge Weinfeld in the language of this statute conflicts with the informed judgment of those responsible for legislation. Representative Emanuel Celler, now Chairman of the House Judiciary Committee, then a member of the subcommittee considering the bill, and its most formidable opponent, said:

> "The bill is so inexpertly worded, so carelessly drawn, so badly put together that the lawyers will have years of field days and the courts will be sorely put to it for years with cases in the effort to tell really what the legislation means. But I warned in committee that State prosecutors would be hobbled and impeded.
>
> "On the other hand they may not be impeded and State prosecution may ensue, in which event the immunity granted would be useless since not complete. I defy anyone to tell me from the terms of the bill whether the State can or cannot prosecute upon the testimony given wherein a crime was admitted. * * *" (100 Cong. Rec. 13326.)

Representative Dodd agreed that:

> "* * * no one can tell whether the immunity granted extends to prosecutions in the State courts and this is but one of the obscurities in the legislation." (*id.* 13328.)

The reasons for this obscurity are a matter of national scandal. This, like so much other of the recent so-called anti-subversive legislation, was rushed through Congress without any opportunity for deliberation. In this respect it has a most apposite progenitor in the earlier immunity legislation which had such unfortunate results.

The Immunity Act of 1954 was enacted shortly before the close of Congress. As Representative Dodd pointed out, it was "rushed through the House of Representatives in the closing hours of the 83d Congress under a suspension of the rules and with only 40 minutes provided for discussion and debate on the legislation" (100 Cong. Rec. 13328). See also the comments of Representatives McCarthy and O'Hara on this extraordinary haste (*id.* at 13331) and of Representative Doyle as to the absence of any printed hearings (*ibid.*). They have not been printed to this day. In the Senate, the bill was handled even more summarily, never going through the Senate Judiciary Committee which for years had bottled up other grand jury immunity bills, and being disposed of briefly on the floor, with Senator Lehman indicating his concern over the lack of opportunity for discussion (*id.*, 13998).

What wonder then that this law purporting to dispose of the most fundamental of rights should not only be drawn most ambiguously, but should not have been understood by the legislators themselves? We are aware of the presumption of regularity that attend the actions of all branches of government. But there must come a time when the realities of life overcome such a presumption. What more appropriate occasion is there for such an event than when historic constitutional guarantees are in jeopardy?

B. The federal government cannot grant immunity against state crime.

Assuming, however, that legislative history might be disregarded and that the statute prohibits all state prosecution for crime, we then face these fundamental problems: 1. Can Congress constitutionally interfere with this aspect of the state police power? 2. If not, is the witness given the immunity from prosecution to which he is entitled under the Fifth Amendment?

Congress cannot prohibit state criminal prosecutions in order to secure evidence of federal crime. So extraordinary a power has never been upheld judicially. It is true that this was one of the alternative premises in *Brown v. Walker, supra.* However, the other premises were more persuasive both to the Court and its successors, particularly the lack of any danger of state prosecution. This was not an unreasonable position in view of the limitation of the federal grand jury investigation therein to the subject of unlawful rebates under the Interstate Commerce Act.

In the subsequent cases on immunity laws, the Supreme Court never again suggested that the federal government had power to prohibit prosecution for state crime. See, *e.g., Hale v. Henkel*, 201 U. S. 43 (1906); *United States v. Murdock*, 284 U. S. 141 (1931). Instead, in each of those cases it relied rather upon the "two sovereignty rule," that each sovereignty is indifferent to the potential exercise of the other's punitive power. The finding of indifference has a necessary corollary in impotence since it is based upon a recognition of the sovereign independence of the states.

Mr. Justice Black has described "the problem of the federal power to interfere with enforcement of state laws through the device of granting immunity from state prosecution to witnesses in federal proceedings" as "replete with both practical and legal difficulties". *Feldman v. United States*, 322 U. S. 487, 497-8 (1944), footnote 8, dissenting opinion.

More recently, too, in discussing S. 16, the most competent legal advice to the Senate was that it could not grant immunity against state prosecution for crime (Senators George, 99 Cong. Rec. 4742; McCarran, *id.* 4743; Kefauver, *ibid.*; Hennings, *ibid.*; Morse, *id.* 8353-4; Cooper, *id.* 8349; *Former Attorney General Biddle*, *id.* 8343; Mr. John W. Davis, *id.* 8343-4; former Solicitor General Perlman, *id.* 8346).

As Mr. Davis said:

> "In spite of the decisions cited in the committee report, there seems still to remain some doubt whether a witness may claim privilege if his testimony might tend to incriminate him under State law. The bill S. 16 does not purport in express terms to grant immunity from prosecution or penalty under State law. The language of the majority opinion in *Brown* v. *Walker* (161 U. S. 591) to the contrary notwithstanding, there may still be doubt of the power of Congress so to provide" (99 Cong. Rec. 8343-4).

The District Court was of the opinion that investigations into crimes involving national security might have a different effect (R. 33). But this statute was not passed for reasons of national security. It began as a bill limited to congressional committees and it exempted the witness from prosecution for any crime. The provisions for investigations into so-called national security situations were a compromise which evolved in the course of the House Committee hearings upon the suggestion of two Congressmen who were otherwise inactive (100 Cong. Rec. 13323). Further, as appears from the statements made by Congressman Walter on the floor of the House, the bill was intended principally to aid the House Committee on Un-American Activities (100 Cong. Rec. 13324). Surely no one will suggest that the investigatory power of that or any other congressional committee is based upon national security and could render state law inoperable.

The District Court, in holding that where national security is involved the federal government may grant immunity, evidently draws this conclusion from the decision of the Pennsylvania Supreme Court in *Commonwealth* v. *Nelson*, 377 Pa. 58, 104 A. 2d 133, *cert. grant. sub. nom. Pennsylvania* v. *Nelson*, 348 U. S. 814. The *Nelson* case is pending before this Court. At most it merely holds that state sedition laws are rendered inoperable by the passage of federal laws which occupied the field. It did not render inoperable other state laws and would leave a witness who testified before a federal grand jury still open to state prosecution under other statutes, *e.g.*, perjury, fraud, etc.

In any event, principles of supersedure which apply to federal substantive legislation have never been extended to a grand jury's right of inquiry. Article VI of the Constitution establishes the supremacy of federal law, not of federal investigations by grand juries or congressional committees. It is one thing for Congress to occupy a specified field, thereby eliminating state regulation therein. It is quite another to give a federal official the power to determine which individuals should not be punished for violating valid and otherwise enforceable state laws.

C. The Constitution requires protection against state prosecution.

We therefore turn to the second question: whether one who is not granted immunity from state prosecution can be compelled by the federal courts to testify against himself. We believe that the answer is clearly in the negative. The older cases, of course, were to the effect that immunity is not complete unless it covers state prosecutions for crime. This was the view of Chief Justice Marshall in *U. S.* v. *Saline Bank*, 1 Pet. 100, 7 L. Ed. 69 (1828), and of Mr. Justice Holmes in *Ballman* v. *Fagan*, 200 U. S. 186 (1905). (See also *U. S. of America* v. *McRae*, L. R. 4 Eq. 327 (1867), affirmed as to the relevant part in L. R. 3, Ch. App. 79, 87

(1868).)* It is the view which has been taken most recently by state and federal courts which have recognized the inadequacy, unreality and unfairness of the "two sovereignty rule." *U. S. v. DiCarlo*, 102 F. Supp. 597 (N. D. Ohio, 1952); *In re Watson*, 293 Mich. 263, 285 (1940); *Gould v. Gould*, 201 App. Div. (N. Y.) 674 (1922); Cf. *Marcello v. U. S.*, 196 Fed. 2nd 437, 442, C. A. 5 (1952). *United States v. Murdock*, 284 U. S. 141, while stating a contrary rule, expressly pointed out that nothing of state concern was involved. Like its predecessors it assumed that the possibility of state prosecution was fanciful.

Whatever may be the problem of a witness examined concerning railroad rebates, as in *Brown v. Walker*, or violations of federal regulatory statutes as in *Hale v. Henkel*, the danger to the federal witness from state prosecution for sedition and subversive activities is considerable. It is the states which, since World War I, have been most vigorous in the prosecution of persons for sedition, subversion, disloyalty and the like (see Gellhorn, *The States and Subversion* (1952)). Here it is fanciful to suggest that there is no real danger of State prosecution.

POINT V

The statute gives the District Court the power to grant immunity.

The statute, in describing the role played by the Court in the grant of immunity to a witness before a grand jury, provides that in cases involving the national security, the United States Attorney "upon the approval of the Attorney

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* A detailed analysis of the cases appears in J. C. Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 Temple Law Quarterly 57, 194 (1934-5) and in two articles by the writer of this brief, Boudin, *The Constitutional Privilege in Operation*, 12 Law. Guild Rev. 128 (1952) and *The Immunity Bill*, 42 Georgetown Law Journal 497 (1954).

General, shall make application to the court that the witness shall be instructed to testify * * * and upon order of the court such witness shall not be excused from testifying * * * on the ground that the testimony * * * may tend to incriminate him." The statute is silent upon the issues to be determined by the Court on such application.

The courts below were apparently of the opinion that under this statute the United States Attorney and the Attorney General alone were given the function of granting immunity and that the function of the court on such an application is the same as in the normal case of a recalcitrant grand jury witness, in which the application of the immunity statute is not involved. See, *e.g.*, *Carlson* v. *United States*, 209 F. 2d 209 (C. A. 1, 1954), and companion cases.

Petitioner, on the other hand, urges that the statutory language was not intended merely to restate the law of the *Carlson* case but that Congress intended to give to the District Court the duty of granting immunity to the witness, or at the least, of approving the propriety of the grant of immunity by the United States Attorney. Indeed, this precise point was the subject of extensive Congressional discussion in both the 82nd and 83rd Congresses, and, as we shall see, Congress considered and expressly rejected a bill which would have made the grant of immunity the exclusive function of the Justice Department. Moreover, that bill was rejected precisely because it did not require court participation in the grant of immunity.

Consideration of the background of the statute is necessary for a full understanding of the immunity law. Never before in this country have we had a general federal statute immunizing a witness for testimony before a grand jury. Nor have we had such a statute with respect to testimony before congressional committees, except for the five-year period from 1857 to 1862 (11 Stat. 155). The statute

relating to congressional committees (12 Stat. 333, 18 U. S. C. 3486), which was in force from 1862 to 1954 merely prohibited the use of the testimony itself and therefore did not give complete constitutional protection to the witness. *Counselman* v. *Hitchcock*, 142 U. S. 547.

In 1951 a campaign for the passage of a new immunity law got under way. Senator McCarran introduced a bill which provided for the granting of immunity to witnesses before congressional committees only (S. 1570, 82nd Cong. 1st Sess.).* That bill proposed that Congress should exercise the power of granting immunity. Members of the Kefauver Committee introduced a bill respecting witnesses before grand juries and courts (S. 1747, 82nd Cong. 1st Sess.).** That bill proposed that the Attorney General should exercise the power of granting immunity.

Neither bill passed because of grave doubts on two counts: first, the political and constitutional objections to any immunity law; and second, a dispute between the Attorney General and Congress as to which of them should exercise the power of granting immunity.

In the 83rd Congress the debate began anew. Once more Senator McCarran introduced his bill relating only to congressional committees and requiring only congressional action for the grant of immunity (S. 16, 83rd Cong. 1st Sess.).*** At the same time, Representative Keating introduced into the House a revised version of S. 1747 of the previous Congress. As revised, the bill covered wit-

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* The bill was reported Aug. 27, 1951, S. Rep. 717, 82d Cong., 1st Sess., 97 Cong. Rec. 10662, amended and passed 98 *id.* 9051, and then reconsidered, *id.*, 9052.

** S. 1747, 82nd Cong., 1st Sess. The Senate Judiciary Committee did not report the Bill. The Kefauver Committee however discussed it in its report, S. Rep. 725, 82nd Cong., 1st Sess., pp. 94-95 (1951).

*** The bill was reported April 20, 1953, 99 Cong. Rec. 3319, S. Rep. 153, 83d Cong., was repeatedly passed over at the requests of Senator Taft and others, *id.*, 4578-9, 4743, 6172, 7990, and finally passed the Senate on July 9, 1953, *id.* 8357.

nesses before congressional committees, grand juries and the courts, but carried over the provision contained in the earlier bill in specifying that only the Attorney General should have the right to grant such immunity (H. R. 6899, 83rd Cong. 1st Sess.).

So the Keating bill, copying verbatim from S. 1747 of the previous Congress, provided:

> "Whenever, in the judgment of the Attorney General, the testimony of any witness * * * in any case or proceeding before any grand jury or court of the United States, is necessary to the public interest, such witness shall not be excused from testifying * * * on the ground that the testimony may tend to incriminate him * * *. But such witness shall not be prosecuted * * *."

Neither S. 1747 in the 82nd Congress nor H. R. 6899 in the 83rd made any reference to a court order, although there can be no doubt that a court order would always be required if a witness was to be held guilty of contempt of court for refusal to answer questions put to him either by a grand jury or by a court. The reason for such requirement is set forth in detail in the *Carlson* case, *supra*, and need not be repeated here, since it is familiar ground. Certainly, the sponsors of the several immunity bills, in their failure to refer to the necessity of a District Court order, did not intend to dispense with the need for such an order as a pre-condition to a finding that a witness was guilty of contempt of court.

The Senate passed S. 16 on July 9, 1953 (99 Cong. Rec. 8357), and the House referred it to a sub-committee of its Judiciary Committee, which likewise had before it H. R. 6899 and several other House bills on the subject. Hearings were held, in the course of which Attorney General Brownell testified in support of H. R. 6899, the Keating Bill. He stated that he supported H. R. 6899 principally because it

> "places the ultimate responsibility for the granting of immunity upon the Attorney General of the United

States, irrespective of whether the witness is before a court, a grand jury or a Congressional body." (Hearings before House Committee on the Judiciary Sub-committee No. 1, June 8, 1954, Prepared Statement; see also Hearings, pp. 36, 39, 40, 44.)

He justified this on the basis of the various policy considerations involved in a grant of immunity which shall be discussed below in Point VI and concluded by stating:

> "For these reasons, I urge favorable consideration of H. R. 6899. If enacted, it would permit the granting of immunity to witnesses before either House of Congress, or its committees but it should vest the Attorney General, acting with the concurrence of appropriate members of Congress, with the authority to grant such immunity. If the testimony is sought for a court or grand jury, the Attorney General alone would be authorized to grant the immunity." (*Ibid.*).

The sub-committee recommended the Keating bill, although not without objection from Congressman Celler, who asserted that immunity should be granted by the District Court rather than by the Attorney General (Hearings, *supra*, pp. 12, 13, 624).

Had the story ended with the passage by Congress of the Keating bill, it would have been clear that the District Court had no role to play in the granting of immunity. In accordance with the usual procedure, the court of course still would have had to direct the witness to answer before his refusal could be construed as contempt. In making such a direction, no doubt, the court would have had to determine whether the witness had refused to answer in an inquiry relating to national defense and whether the Attorney General had in fact granted immunity; it would not have passed on the propriety of the grant of immunity itself.

But the story did not end here, for the House Judiciary Committee refused to accept the recommendation of its

sub-committee. Moreover, it refused to accept it precisely *because* it disagreed with the sub-committee on the identity of the agency to grant immunity. Said the full committee, in rejecting the sub-committee report:

> "While the Senate version of S. 16 contained no provision relating to grand jury or court proceedings, both the sub-committee and full Judiciary do. In that regard they are substantially the same in that both require the approval of the Attorney General that such testimony would be in the public interest. The full committee amendment requires that application be made to a court after the approval of the Attorney General that the witness be instructed to testify or produce evidence whereas under H. R. 6895 only the approval of the Attorney General was necessary prior to granting immunity." (H. Rep. No. 2606, 83rd Cong. 2nd Sess., p. 4.)

The Committee discussed the procedure to be followed in the case of a recalcitrant witness:

> "Finally, before the immunity is actually granted to the witness, [before a committee], the approval of the United States district court wherein the inquiry is being conducted is to be obtained. The court in reaching its decision will have the aid of the views and facts of both the congressional committee and the Attorney General" (*id.* at 8).

* * * * * * *

> "In cases before a grand jury or a court, similar precaution exists. * * *"

> "In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill." (Ibid.)

Whether the testimony is required by a congressional committee or a grand jury, the "two other independent but interested parties" who must concur in the grant of immunity are the Attorney General and the United States District Court.

Congress did not trust the Attorney General to exercise the immunity power. We say this without any intention to reflect upon the present incumbent, for a similar power had been sought for Newbold Morris as a special prosecutor by President Truman and was rejected by the Congress (New York Times, February 15, 1952, pages 1, 10; February 20, 1952, page 1; February 21, 1952; Editorial, Baltimore Sun, February 18, 1952).

Indeed, it may also be said that the Attorney General did not trust congressmen to exercise their power. See, *e.g.*, the addresses of Attorney General McGrath (Address, Maryland Bar Ass'n, June 23, 1951) and of Attorney General Brownell (Address before the Law Club of Chicago, Nov. 6, 1953).

Hence one commentator said in distinguishing this law from all previous statutes:

> "* * * But the Attorney General and the Congress, impliedly less trustworthy, are subjected to the scrutiny of a federal district court before they may grant immunity." * * * (Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 Geo. Wash. L. Rev. 501, 509 (1955).)*

Prior to the inception of this litigation and the submission of the government brief in the District Court, there was no confusion as to the meaning of this bill. Representative Keating, who was manager of the bill reported out by the Judiciary Committee, said, in the course of the congressional debate on the bill:

> "* * * It does provide for the granting of immunity in both proceedings before congressional investigating committees and before courts or in grand jury proceedings, but it does not leave the final determination

* See also *Federal Anti-Subversive Legislation of 1954*, 55 Colum. L. Rev. 631, 647 (1955): "Probably the district court will exercise the same discretionary control over grants of immunity in court as in legislative proceedings."

> as to the granting of immunity in either the hands of the investigating committee or the Attorney General, but rather the court." (100 Cong. Rec. 13323.) *

Representative Keating went on to point out that the bill really had two parts, one having to do with witness before a congressional committee and the other having to do with witnesses before a grand jury or court. He summarized the provisions of the bill with respect to grand juries and courts by saying:

> "* * * In that case it says that if the United States Attorney in a particular area has a prosecution before him and feels that immunity should be granted to some prospective witness, he shall first get the approval of the Attorney General to the granting of that immunity and then shall appeal to the court and the court will pass on the question, and if convinced of the propriety, issue the order for immunity." (Ibid.)

He summed up this aspect of the bill by stating:

> "* * * It requires, in the case of congressional investigations, virtual agreement [as to the grant of immunity] between all three branches of the Government—legislative, executive, and judicial—before an effective grant of immunity is conferred. In court proceedings it requires approval of both the prosecutor and the court" (*id.* 13324).

Similar views were expressed by Representative Celler, an opponent of the bill (100 Cong. Rec. 13325) and by Representative Hyde, a supporter of it (id. at 13328).

Several months after the passage of the law, but a few weeks before the inception of this litigation, the Attorney General made perfectly clear his understanding of the meaning of the statute:

> "The immunity will be granted under the new law only on questions regarding espionage, treason and other crimes of subversion. It can only be extended to reluctant witnesses before Congressional committees

* See also his remarks to the same effect at 100 Cong. Rec. 13328.

and Federal Courts and Grand Juries—and only after they have been apprised fully of their rights and have refused to answer specific questions. The immunity will extend only to that line of questioning and no other. *It will be granted by a Federal District Judge*, after advice from the Attorney General, upon petition of a United States Attorney or a representative of Congress. It will be accompanied by a court order to the witness to answer the questions. Failure to answer will be subject to contempt action before the court, with whatever penalties the court deems necessary. Failure to answer fully and truthfully, of course, will be subject to prosecution for perjury."

(Brownell, *Address at Twentieth Century General Congress, General Society of Mayflower Descendants*, September 13, 1954, pp. 5-6, emphasis supplied.)

The Attorney General was not alone in this view of the Immunity Law. The late Mr. Justice Jackson of this Court obviously had this law in mind when he referred, in his *Godkin Lectures*, to "Recent trends to empower judges * * * to approve a waiver of prosecution in order to force a witness to give self-incriminating testimony * * *." (Jackson, *The Supreme Court in the American System of Government* (1954), 12.)

Professor Robert G. Dixon, the leading scholar in the immunity field, has said:

"The novel and disturbing feature of the 1954 immunity statute, which applies to congressional investigations and to federal grand jury and court proceedings, is that the discretion and power to grant immunity is transferred to the United States district courts * * * *." (Dixon, *supra*, p. 502).

The commencement of this litigation, however, faced the government with a serious dilemma. To apply the statute as had been intended by Congress might result in a decision that the law was unconstitutional; at the very least, it would require that the District Court take testimony on the basis

of which it might make a finding that it should approve immunity for the witness. That requirement might well pose difficulties for the government and might even result in embarrassment. Hence, the United States Attorney was constrained to repudiate the views of the Congress which passed the law and of the Attorney General and to argue that the statutory language meant that the role of the court was limited to a direction to the witness to answer. Immunity, argued the government, was not "granted by a Federal District Judge" as the Attorney General had publicly stated only a few weeks before, but by the United States Attorney and the Attorney General. The three year debate in Congress was ignored; the statute was read as if H. R. 6899 had been passed and the statutory language respecting judicial action was treated as surplusage or as an unnecessary reenactment of *Carlson* v. *United States*, *supra*.

The District Court accepted the government view. It first distinguished the language used in sections (a) and (b) of the Act, relating to witnesses appearing before congressional committees, from the language used in subdivision (c), relating to witnesses before grand juries and courts. In concluding that sections (a) and (b) required a judicial grant of immunity, while section (c) did not, the court assumed a preciseness in statutory language which rarely exists and which certainly could not be expected here in view of the haste with which the bill, several times quickly revised in the few days before passage, went through the House with limited debate. The District Court's technique has been described as "dubious, in view of the legislative history" (Note, 55 Colum. L. Rev. *supra*, at 657) and as "an ingenious construction" of the statute (Dixon, *supra*, at p. 502). The government will concede that neither dubiety nor ingenuity is a proper tool for the judicial construction of legislative action.

The District Court further found that the statutory history was "inconclusive" (R. 42), a finding inexplicable in view of the clear intent expressed over and over again, both

in the House Judiciary Committee report and on the floor of the House.

It cited the remarks of Representative Walter at 100 Congressional Record 13325 in support of its assertion that he took a view different from that of Representative Keating, cited above. There is nothing in that page of the Record to support the District Court's view. The page cited is devoted largely to the remarks of Representative Javits, who expressed his opinion that the function of the District Court would be limited to a consideration of the materiality of the question posed to the witness; and that the Court would not pass on the question of immunity. Representative Walter responded by saying: "I do not think so. I think this goes much further than that." This must have persuaded Representative Javits as to the construction of the bill, for he later stated: "The bill presented to us also gives the power to grant immunity to the courts in criminal cases * * * and in proceedings before grand juries." (100 Cong. Rec. 13330.) The government cannot derive much comfort from this portion of the Congressional debate.

Disregarding most of the language cited above from both the Judiciary Committee Report and the debate on the floor of the House, the District Court did comment on the language in the report which noted that:

> "In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill."

Petitioner had argued in the District Court, as he does here, that the "two other independent but interested parties" who must concur in the grant of immunity are the Attorney General and the court. The court below refused to accept this reading and came to the conclusion that the two parties who must concur are the Attorney General and

the United States Attorney (R. 30). Leaving aside the question as to whether these two parties can properly be called "independent," this reading requires us to ignore the word "other" in the language cited. (Note, 55 Colum. L. Rev. 637, 648 (1955).)

The government argues that the petitioner seeks to prove that Congress intended to pass an unconstitutional statute and takes refuge in the familiar argument that this Court will not construe ambiguous statutory language in order to reach a finding of unconstitutionality.

As a general proposition, the rule is a valid one, but it is not applicable here. The statute here is not specific on the role of the Court in granting immunity, but there is no ambiguity at all in the legislative history. Not a word has been or can be cited to show that Congress intended to pass a statute which gave the power to grant immunity to the Attorney General and to the United States Attorney. Every word in the legislative history points to precisely the contrary result. Petitioner does not seek to distort language to bring about a holding of unconstitutionality; he seeks only to interpret the statute as Congress clearly intended. Otherwise there would be imposed on Congress a statute which it expressly and repeatedly refused to pass, merely in an effort to read constitutionality into an invalid statute.

POINT VI

The power to grant immunity is not a judicial function.

If Congress intended, as the Attorney General stated, that the District Court should participate in the grant of immunity, this conviction for contempt must be reversed. For, if the District Court was given that function to perform, it could have done so only on the basis of a record, and the Court below expressly refused to make such a

record because in its view, it was neither granting immunity nor approving its grant by the Attorney General. (R. 43).

More fundamental is the fact that the power to grant immunity cannot be a judicial function. It is an executive or legislative function, and under the Constitution of the United States, legislative and executive functions may not be delegated to the federal courts. That power has never before been given to a federal court; every other statute including those before this Court has given that power to the administrative agencies which are not subject to the limitations of Article III of the Constitution. In short, judicial exercise of the immunity power violates the separation of powers doctrine which remains an important protection of our fundamental liberties. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

We shall not argue this point at length, since it must be conceded that if our view of the statute is correct, this conviction must be reversed in any event.

A grant of immunity may be viewed either as a pardon or as an amnesty for crimes committed. The power to grant pardons rests exclusively in the President of the United States and cannot be delegated (Constitution, Article II, Section 2; *Ex parte Garland*, 4 Wall. 333 (1886). This was the view of the Senate Judiciary Committee in 1876 when it opposed authorizing Congress to give immunity to witnesses in its investigations (Sen. Rep. 253, 44 Cong. 1st Sess.). If a grant of immunity be viewed as an amnesty, it is probably the exercise of legislative power. This seems to have been the reasoning of the Court in *Brown* v. *Walker*, 161 U. S. 591, and it is certainly the core of the decision of Chief Judge Cardozo in *Matter of Doyle* v. *Hofstader*, 257 N. Y. 244 (1931).

The determination of whether immunity ought to be granted involves the consideration of many important

policy questions. Attorney General Brownell recognized these, when, on March 18, 1954, he said:

> "The Attorney General is the officer most likely to know the facts; he is the one person who knows the plans for pending prosecutions; he is the person best able to assess the value of the testimony to be obtained against the loss of power to prosecute." (Brownell, *Address before the Sixth Annual Conference on Civil Liberties of the National Civil Liberties Clearing House.*)

As the American Bar Association Commission on Organized Crime pointed out:

> "* * * Some responsible authority must make the determination of whether, as a matter of policy, it is desirable to immunize this witness and forgive him his crimes, in return for testimony which will help to convict others." (Report, 1953, p. 37.)

It has been described as "a delicate policy judgment" and "an act which is 'political' in the highest sense of the term" (*Dixon, supra*, pp. 511, 513). The various elements which go into the determination of whether immunity should be granted are summarized by John M. Kernochan, Director of the Legislative Drafting Research Fund, Columbia University, who said:

> "1. Immunity legislation inevitably poses this problem: by whom should the actual granting of immunity be controlled? In many of the provisions examined for the present study, the evidence is strong that this problem was given inadequate attention. Yet the selection of the agency to decide whether or not evidence should be compelled and immunity conferred in a particular case is one of the most critical issues raised by immunity statutes. It should receive painstaking consideration in any drafting or revision. The determination which, as a practical matter, must be made by the selected agency in any specific instance is a complex one. Some of the elements of that determination can be roughly indicated by a question:
>
> "Q. Is the evidence expectable from W (this witness) so important to this proceeding, and

> is this proceeding so important, that W should now be compelled to give his evidence and so be immunized, in spite of the offense for which he may go unpunished and in spite of the damage his immunity may do to present or future efforts to enforce the criminal laws of this state or to the wider public interest in a just, orderly society?
>
> "If this formulation is reasonably accurate, it strongly suggests that the agency best qualified to make the determination will be one thoroughly and currently conversant with both the general and the detailed situations regarding enforcement of the criminal laws. To make a wise decision, that agency should be informed with respect to the particular witness involved, his offense, and his importance to the proceeding. It should be equipped to weigh this proceeding against others pending or planned, not merely locally but on a wider basis. These considerations seem to point clearly to the enforcement authorities as the proper agency to exercise the principal control over grants of immunity. Such a solution conforms to the essential nature of immunity legislation as an instrument in aid of law enforcement. * * *" (Amer. Bar Ass'n, *Immunized Crime and Law Enforcement*, pp. 168-9.)

This is not the stuff of judicial decision.* We merely call the attention of the Court to such classic decisions as *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908); *Hayburn's Case*, 2 Dall. 409 (1792); and *Gordon v. U. S.*, 117 U. S. 697 (1864); *Matter of Richardson*, 247 N. Y. 401 (1928).

As Mr. Justice Jackson said in discussing Article III in relation to the immunity power:

> "It also precludes imposition on federal constitutional courts of nonjudicial duties. Recent trends to empower judges to grant or deny wiretapping rights to a prosecutor or to approve a waiver of prosecution in order to force a witness to give self-incriminating

* This is the conclusion, too, of the most thorough study made of this subject. Dixon, *supra*.

testimony raise interesting and dubious questions. A federal court can perform but one function—that of deciding litigations—and can proceed in no manner except by the judicial process." (Jackson, *The Supreme Court in the American System of Government*, p. 12.)

The fact is that Congress here was seeking the unattainable. It recognized that the power to grant immunity, lodged exclusively either in a committee of Congress or in a political officer of the United States Government, might, particularly in these times, result in serious abuses. So it decided to grant the power to confer immunity on that branch of the government which is least likely to be affected by political considerations, *i.e.*, the judiciary.

Unfortunately for the desire of Congress, our Constitution does not permit such a delegation. This is not the first time in our history that Congress has sought unsuccessfully to assign to the courts a non-judicial function which it felt it could not safely delegate to the executive branch. *Muskrat* v. *United States*, 219 U. S. 346 (1911).

We are, of course, aware of the many federal immunity statutes on the books today in which witnesses upon testifying before administrative agencies receive immunity from prosecution for crime. None of these laws, however, supports the validity of the statute in issue here since in none of them was a federal court given the duty of determining whether immunity should be given.

In *Brown* v. *Walker*, *supra*, an immunity law applicable to a witness before a grand jury was held valid. But the immunity vested in him immediately upon his testifying in accordance with the legislative mandate. No judge played any part in the grant of immunity. The Court's function there, unlike here, was the standard one of directing the witness to answer a question put to him by a grand jury.

In the present case it is the District Court's duty to decide whether, as a matter of public policy, immunity should be given the witness. The distinction between that and the situation in *Brown* v. *Walker*, *supra*, is the heart of the problem before this Court.

There is another constitutional defect in the statute. We treat it briefly because it is almost self-explanatory and, in addition, may not be reached by this court. We refer to the fact that the principal sections of the statute, those relating to congressional committees, involve no "case and controversy" in the constitutional sense. See *United States* v. *Ferreira*, 13 How. 40 (1851); Dixon, *supra*, Taylor, *Grand Inquest*, 296-300 (1955). In enforcing these sections, the Court therefore exercises no judicial function.

We do not believe that Congress intended the grand jury section, here under consideration, to survive if the congressional committee sections are struck down. This Court "must give heed to" the Congressional intent. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. Those sections were the "vital aim" of the statute, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 (1932). S. 16 as it originally passed the Senate was limited to that subject; in several years no grand jury bill even emerged from its Judiciary Committee. The House bill, which treated both of grand juries and committees was described by Representative Walter as intended primarily for use of the House Committee on Un-American Activities (100 Cong. Rec. 13325). Finally it is well to recall the rivalry between the Attorney General and Congress over control of the immunity power. It is plain that the various sections of the law were "conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole," *Allen* v. *Louisiana*, 103 U. S. 80 (1880); *i.e.*, one was "an inducing cause" of the other. 2 Sutherland, *Statutory Construction*, 100-181 (2d Ed. 1943). See *Woods* v. *Shore-*

line Coop. Apt's., 84 F. Supp. 660, 666 (N. D. Ill. 1949) *rev'd on other gr'ds*, 338 U. S. 897 (1949).

This explains the absence of a separability clause which today is almost as common as a statute's title. Sutherland, *supra*, 179, ftnote 7. The clause is a significant indication of Congress' intention. *Dorchy* v. *Kansas*, 264 U. S. 286 (1924). The "omission of such a provision evidences clearly the legislative intent that this statute must stand or fall as a whole." *Family Security Life Ins. Co.* v. *Daniel*, 79 F. Supp. 62, 65-66 (E. D. S. C., 1948, *rev'd on other gr'ds*, 336 U. S. 220 (1949). Finally, "(T)he penal nature of a statute may be a makeweight on the side of inseparability." Sutherland, *supra*, 196-197; 6 R. C. L. 132; *State* v. *Cudahy Packing Co.*, 33 Mont. 179, 82 P. 833 (1905).

We conclude that the legislative history of these bills, Congress' insistence upon some immunity power, the inability of a grand jury bill alone to pass either House, the absence of a separability clause and the penal character of the statute make an invincible case for inseparability. Since the Congressional appeal to the courts is unconstitutional under the "case and controversy" principle, the grand jury sections, assuming their validity, would be unenforceable because of Congress' intention to pass a single cohesive statute.

POINT VII

If the statute is constitutional, the Government failed to show why the District Court should exercise its discretion by granting immunity. Petitioner affirmatively showed why the Government's application should be denied.

We have shown that important policy decisions are involved in the grant of immunity. We have argued that this is not a judicial function. Should this Court nevertheless hold that the exercise of the immunity power is

a judicial function, it must reverse the judgment of conviction because of the total absence of evidence supporting the Government's application. For under our system of law, a judgment must be based upon a court's independent determination based upon the record before it.

This general rule is particularly applicable here because of the nature of the immunity grant, its necessarily restricted use and the legislative history of the statute involved. It was not the legislative intention that immunity be granted on a wholesale basis. That has never been the conception of the immunity power. As Chief Judge Cardozo has said:

> "* * * a power to suspend the criminal law by the tender of immunity is not an implied or inherent incident of a power to investigate. It may be necessary for fruitful results in a particular instance, but is not so generally indispensable as to attach itself automatically to the mere power to inquire." *Matter of Doyle* v. *Hofstader*, *supra*, at 260-261.

Mr. Justice Frankfurter, dissenting in *United States* v. *Monia*, 317 U. S. 424, 434 (1943), said:

> "Indeed, so sensitive has Congress been against immunizing crime that it has not entrusted prosecutors generally with the power to relieve witnesses from prosecution in exchange for incriminating evidence against others."

The Chairman of the Securities and Exchange Commission has shown how these general considerations are actually applied in administrative agencies:

> "Generally speaking, the power to grant immunity is one which is very rarely exercised and even when it is the grant of immunity is extended only to minor participants in a scheme after it has been demonstrated that their testimony is an absolute prerequisite to the successful completion of an investigation." *Letter of Donald C. Cook, to Sen. Harley Kilgore*, 99 Cong. Rec. 8343 (1953).

If immunity was not to be granted upon a wholesale basis, what are the factors which must be presented to the Court before it is to act in the particular case? We have set them forth above at Point VI and they need not be repeated here.

These requirements were not met by the Government. It failed to present facts either in its written of oral application upon which a court might act judicially. Thus the District Court was never told what reasons in the Government's view justified the prayer for relief. No evidence was offered by the Government. The court below did not examine the grand jury minutes. It was merely handed the United States Attorney's "judgment" and the Attorney General's "approval", predicated upon undisclosed facts—assuming that any existed.

A court of the United States is not an auxiliary of the Department of Justice. Its decisions are not determined by the judgments of prosecuting officials. It cannot intelligently act upon an application when not a single relevant factor is presented in support thereof. Therefore, the Government failed to sustain its burden.

Petitioner, on the other hand, submitted an affidavit showing why the immunity power should not be exercised by the Court. He showed that the investigation was a political *cause celèbre* in which the Administration had staked much to persuade the American people that petitioner and other New Deal figures were guilty of espionage.

Petitioner, like many other former government officials, has been subjected to repeated harassment for eight years by the grand juries and congressional investigating committees, with a fanfare of injurious publicity accompanying even allegedly secret grand jury proceedings. The respondent has undercut the very foundation of the grand jury system by publicly charging the grand jury witnesses with membership in an espionage ring (R. 16, 19-21).

Petitioner is faced with the denouement of these eight years of harassment if he cannot preserve his right of silence. The Administration's stake in this adventure is now so high that it must emerge at least with a perjury indictment. It should not be forgotten that this original accuser, Elizabeth Bentley, was the principal witness in the Remington case, *supra*, was shown therein to have written an espionage exposé in which the grand jury foreman had a financial interest, and that she recently was made a staff consultant to the House Committee on Un-American Activities (N. Y. Times, Aug. 19, 1955, p. 1). There has been and can be no indictment for substantive crime because it has never been justified by the facts despite the public accusations by the highest law officer of the Government. But if petitioner repeats the denials which he made in 1947 before the F.B.I. and in 1948 before a congressional committee, he is a natural victim.

POINT VIII

The order below should be reversed because it directed petitioner to answer questions in violation of his First Amendment rights and not relevant to a bona fide investigation into espionage.

The grand jury hearing purported to be an investigation into the crime of espionage. But many of the questions relate to a different subject, that of the alleged Communist party membership of various persons.

A. The First Amendment

We address ourselves here to one basic point: an inquiry into political membership and associations violates the First Amendment to the Constitution. It would be a work of supererogation for us now to review the historical and legal materials on this subject. We merely call the Court's attention to two such statements, Coke's in

Edwards' Case, 13 Co. Rep. 9, 77 Eng. Rep. 1421, and Mr. Justice Jackson's in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943).

Of course, this Court has not read the First Amendment as we believe history intended it. But it is one thing for a court to decline to interfere with the power of a coordinate branch of the Government, such as the legislature; it is another for it to take the principal responsibility for an infringement of fundamental liberty.

The District Court was in error in its reliance upon the majority opinions in such cases as *Josephson* v. *United States*, 165 F. 2d 82 (C. A. 2, 1947), involving the right of the House Committee on Un-American Activities to investigate into the area of political propaganda (R. 43-44). Surely it will not be argued by the Government that a grand jury has an equal right to examine into propaganda in contrast to crime. In any event, the question remains whether this Court will give its sanction to such an investigation when it is not faced with a question of relations with a coordinate branch of the Government.*

In determining whether testimony should be compelled, as in the present case, this Court should give the most liberal construction possible to the First Amendment for the protection of the liberties it encompasses. This is one case in which the Court's discretion is unhampered in determining that the federal courts will not invade the basic freedoms of association and belief.

Accordingly, the questions relating to political belief and affiliation were improper and the refusal to answer them could not be the basis for a contempt adjudication.

---

* The reference of the District Court to *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2, 1954) is inapposite. Since that case did not involve espionage; it hardly supports an inquiry into political affiliations in the course of an alleged espionage investigation such as the present one.

B. Irrelevance and Entrapment

The danger of perjury prosecutions and entrapment are illustrated by the scope of the questions for which approval was secured by the Government.

This grand jury investigation purported to be an inquiry into espionage during the years 1941-5, which were the subject of the Bentley accusations. Yet, as we have seen, many of the questions put to petitioner relate not to espionage, but to the alleged membership of persons in the Communist Party.

Whatever may be one's views on the subjects of Communists and Communism, there is no doubt but that these are matters quite different from that of espionage. We know of only one person who has consistently and deliberately confused these subjects, namely, Senator Joseph McCarthy, in his Fort Monmouth and other hearings (S. Reps. 230, 231, 84th Cong., 1st Sess. (1955)).

The purpose of this inquiry into political membership is quite plain. An indictment for espionage is obviously not justified, else it would have been instituted long ago. However, inquiries concerning Communist party membership, affiliations and sympathies have proven susceptible of manipulation into perjury prosecutions. See *U. S. v. Neff*, 212 Fed. 2d 297 (C. A. 3, 1954); *Gold v United States*, *supra*; *United States v. Remington*, *supra*; *Bridges v. United States*, *supra*; *United States v. Lattimore*, *supra*.

Inquiries into this subject are not bona-fide investigations of crime, because it is not a crime to be a member of the Communist party. But these inquiries are sources of entrapment because of the vagueness of the concept of membership in a political party which the courts and others have had difficulty in defining. *United States v. Remington*, *supra*. See also *Hearings* on Institute of Pacific Relations before Subcommittee on Internal Security, 82nd Cong., 1st and 2nd sess., pp. 3523, 3526, where Dr. Owen

Lattimore and the Internal Security Subcommittee had considerable difficulty in reaching a definition of that term.

The new Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. 784, sets forth fourteen criteria of Communist party membership which accentuate the seriousness of the problem. As if this were not enough the statute goes on to provide:

> "The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

We have seen in one case that the views of a witness on the subject of trade with China were considered relevant to a jury's determination as to whether he was a member of the Communist party. *Bridges* v. *U. S.*, supra. The Government's ready use of such elastic terms as "a sympathizer or any other kind of promoter of Communism or Communist interests" is notorious. *United States* v. *Lattimore*, *supra*. That particular prosecution will long be a landmark warning of the dangers of testimony on political subjects and the motives of those who would compel it.

POINT IX

The immunity order was invalid because it did not contain any grant of immunity. Nor did it define the scope of petitioner's immunity against future prosecution, penalties and forfeitures.

The Government's original application to Judge Weinfeld was accompanied by an order which failed to contain a grant of immunity or even to describe the immunity intended to be given to the witness. The District Court originally stated that:

"* * * in the event * * * that I conclude to grant this application, I am not quite satisfied with the form of the order. I think the order should contain a very clear and unequivocal grant of the immunity so that there can't be any question about it and it has got to be as broad as the statute. And in this form of order that you have submitted to me I find no reference at all to the grant of immunity. I think that should be part of the order and actually be a separate decretal provision" (S. M. 80-81).

The Government opposed the inclusion in the order of any grant of immunity or even a reference to the kind of immunity to which the witness was entitled as a result of his testimony. As if this were not enough, it deliberately emphasized the uncertainties of the situation and hence the hazards to the witness by stating:

"* * * To be sure this Court, in connection with respondent's attack on the constitutionality of the statute, had occasion to reach certain conclusions regarding the extent of immunity granted by the act. But the matter of the extent of the immunity which will accrue to respondent by his testimony is after all not directly at issue now. That question will only arise should an attempt later be made to prosecute the respondent. This may never occur and the wiser policy is to await the event. It is enough for present purposes that the order clearly state that the respondent is instructed to testify subject to the immunity statute" (Government's Memorandum in Opposition to Counter-Order, p. 6).*

The Court, however, signed an order which contained neither a grant of immunity nor any reference to its scope (R. 44).

Thus the so-called immunity statute which began with uncertainty has ended as intended by the Government in even greater uncertainty. The District Court's earlier intention to include an immunity grant in the order was the only

* This memorandum was presented to the Court below and will be filed with this Court.

one which could give protection to the witness, assuming that the problems of statutory construction and constitutional law could be resolved. Further, it was the only logical one based upon a statute granting coordinate power to a court.

But even if we had been in error with respect to the Court's role, it is inconceivable that the order directing the witness to testify should deliberately leave undefined the nature of the protection intended to be given the witness.

It is perfectly clear why the District Court changed its position following the conclusion of the hearing. It believed that an inclusion in the order of a *description* of the immunity might be construed as a *grant* of the immunity and hence an acceptance of the basic position of petitioner, namely, that the District Court shared in the immunity grant. Whatever the explanation for this surprising omission, the resulting order promises such vague benefits, creates such hazards and leaves the witness so helpless and ignorant of his fate that it cannot stand as a valid direction to surrender the historic privilege guaranteed him by the Fifth Amendment.

CONCLUSION

The judgment of conviction and the immunity order should be reversed and the proceedings below dismissed.

Respectfully submitted,

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APPENDIX

Public Law 600—83d Congress

CHAPTER 769—2D SESSION

"§ 3486. Compelled testimony tending to incriminate witnesses; immunity

"(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

"(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

"(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and

that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a

United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

"(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court.

"(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212 (a) (27), (28), (29) or 241 (a) (6), (7) or 313 (a) of the Immigration and Nationality Act (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is

necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture, nor or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

"(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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IN THE

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OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,
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against

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

I

There is an air of abstraction about the Government's brief which seems intended to lull the reader into a disregard of the facts. Such abstract consideration of constitutional questions is not conducive to the intelligent development of our law. The facts are notorious. Petitioner and many other loyal former Government employees, including Under Secretary of the Treasury, Mr. Harry Dexter White, have been haled before investigating bodies over nearly a decade in an alleged inquiry into an espionage conspiracy claimed by Miss Elizabeth Bentley to have occurred during the last war (R. 9-10). Such widespread devastation of human lives is rare in our history; it is part of the widespread hysteria of our times.

The investigation involved herein was the latest phase of this harassment. Grand juries in four cities called former government employees before them to inquire whether they and their friends had been Communists or spies during the last war (R. 2-4, 21). These investigations were accompanied by extensive newspaper publicity (R. 20-21), cf. *Application of United Electrical Radio & Machine Workers of America*, 111 F. Supp. 858 (S. D. N. Y. 1953). Simultaneously the Assistant Attorney General in charge of the investigation made a public address charging the petitioner with espionage (R. 19). Previously the Attorney-General himself, together with the Director of the Federal Bureau of Investigation, had made similar public charges before a congressional investigating committee against petitioner and others (R. 15).

In the fall of 1954 petitioner was called before two grand juries, one in the District of Columbia, the other in the Southern District of New York (R. 10). Petitioner was asked whether he, Mr. White, and other former government officials, had been members of the Communist Party or of an espionage ring (R. 2, 3). He declined to answer these questions, asserting his constitutional privilege, and appeared before a federal district judge upon the Government's application for a grant of immunity in the second of these examinations.

He challenged the *bona fides* of the investigation, alleging that it was politically inspired and that it was not an inquiry into crime (R. 7-22). He requested, to no avail, that the district judge examine the grand jury minutes to confirm this charge (Tr. 73-76).* He appealed to the district judge to exercise that supervision over the Grand Jury which is required under *Hale* v. *Henkel*, 201 U. S. 43, 65-66 (1906), and *Hoffman* v. *United States*, 341 U. S. 479, 485 (1951).

* The charge is particularly true here where the questions related to events nine to thirteen years ago. Traditionally the immunity power has been used to meet some present evil.

In the course of the argument, it was pointed out to the district judge that a full denial of knowledge of the espionage, allegedly, under investigation by the grand jury, had been given to the F. B. I., a grand jury and a congressional committee by petitioner in 1947 and 1948 (R. 10-12). Accordingly, the most recent grand jury appeared to be primarily interested in securing a repetition of petitioner's *denials* of political affiliations which it might use as the basis of a prosecution for perjury.

Despite petitioner's uncontroverted affidavit setting forth the facts in support of the foregoing, the District Court abdicated its responsibility as a protector of citizens vis-a-vis grand juries under its jurisdiction, as the agency authorized by Congress to grant immunity, and as a court required to set aside any arbitrary action of the other branches of government.

II.

The Government's discussion of the constitutional privilege starts and ends with *Brown* v. *Walker*, 161 U. S. 591 (1896). It is completely silent as to the historic origins of the privilege. "Our forefathers when they wrote this provision into the fifth amendment of the Constitution, had in mind a lot of history which has been largely forgotten today" (*Maffie* v. *United States*, 209 F. 2d 225, 227 (C. A. 1st 1954)).

The Government treats the privilege in the limited sense of a protection against imprisonment. In so doing it forgets that the privilege was the fruit of the Puritan Revolution, and that "the real political significance of Puritanism" was "its insistence upon the sole criterion of the individual conscience" (Gibb, *John Lilburne, The Leveller* (1947), 69 *id.* at 111, 167).

The dissenters of the Seventeenth Century "do not care about their goods or esteem their lives when efforts are made to moderate their doctrines" (see Gibb, *supra*, p. 39)

Their battle with the Star Chamber and the High Commission did not involve objections to particular questions but a refusal to take the oath *ex officio*. It was John Wharton who proceeded "to condemn all such oaths roundly—'the oath of churchwardenship, the oath of canonical obedience, and the oath *ex officio*'" (Gibb, *supra*, p. 48).

The Act for the Abolition of the Court of High Commission, 16 Car. 1, c. 11, s. 4 (1641) which resulted from this attitude of the Puritans was not limited to the danger of physical incarceration. It directed the ecclesiastical officials not to

> "*ex officio*, or at the instance or promotion of any other person whatsoever, urge, enforce, tender, give or minister unto any churchwarden, sidesman or other person whatsoever, any corporal oath, whereby he or she shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse himself or herself of any crime, offence, delinquency or misdemeanour, or any neglect, matter or thing, whereby or by reason whereof, he or she shall or may be liable or exposed to any censure, pain, penalty or punishment whatsoever."

It must be remembered that the oath itself was regarded as a form of unlawful pressure to be resisted by the witnesses. The privilege was a defense against both physical compulsion and the moral compulsion that an oath to a vengeful God commands of a pious soul.* Hence Governor Bradford's ministers' warning that a magistrate "may not

*Senator Bayard was therefore quite right historically when he said that "yet it is of far greater and higher importance not to permit a man to be subjected to the torture of being obliged to give evidence against himself * * *" 50 Cong. Globe, 37th Cong., 2d Sess. 430 (1862). In *Omychund* v. *Barker*, 1 Atk. 22, 48, 26 Eng. Rep. 15, 32 (1744), Hardwicke, J., said that the oath was an "appeal to the Supreme Being, as think him the rewarder of truth, and the avenger of falsehoods." See also *R.* v. *White*, 1 Leach Cr. L., 4th Ed. 430, 168 Eng. Rep. 317 (K. B. 1786).

extracte a confession by any violente means, whether it b
by an oath imposed or by any punishment inflicted."*

No extended historical analysis is needed to establi
that ."[t]he first ten amendments were proposed a
adopted largely because of fear that Government might u
duly interfere with prized individual liberties." Black,
dissenting in *Adamson* v. *California*, 332 U. S. 46, 7
These amendments "had their origin, as all know, in t
belief of many patriotic statesmen ." " " that, under t
Constitution,' as originally submitted to the People f
adoption or rejection, the national government might d
regard the fundamental principles of Anglo-American li
erty; " " "." Harlan, J. dissenting in *Twining* v. *New Je
sey*, 211 U. S. 78, 118.

The stirring story of the origin of our Bill of Rigl
has been frequently told; the most recent telling is in R
land, *The Birth of the Bill of Rights, 1776-1791* (195
George Mason, to whom, above all, we owe both the Virgi
Bill of Rights and our Federal Bill of Rights, "saw t
necessity for designating the people as the source of
political power" (Rutland, *supra*, 35). Madison was co
cerned with "a standard of free government which wou
create a national tradition to 'counteract the impulses
interest and passion'" (*ibid.*, p. 193). The only oppositi
to a bill of rights was led by those who believed that t
federal government was one of limited powers, and he
that the further limitations proposed by Mason w
unnecessary. This view is inherent in Section 2 of the V

* Bradford, *History of Plymouth Plantation*, Mass. Hist. S
Coll., ser. 4, Vol. 3, pp. 306-307 (1912). From this and other m
terial, Pittman correctly says, "it is apparent that the Puritan u
placed the ecclesiastical oath in the category of 'tortures' just a
did the rack, the boot, and the thumbscrew." Pittman: *The Colo
and Constitutional History of the Privilege Against Self-Incrimi
tion in America*, 21 Va. L. Rev. 763, 774 (1935).

ginia Declaration of Rights: "That all power is vested in and consequently derived from the people; that magistrates are their trustees and servants, and at all times amenable to them."

In order to insure the application of this principle there was included the Ninth Amendment providing: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See the first full study on this subject, Patterson, *The Forgotten Ninth Amendment* (1955).

The Fifth Amendment must be read in the light of the purposes of the Bill of Rights. It is its conception that the people are the ultimate source of power, that the federal government is one of limited powers and that the people must be protected against the danger that the government will not recognize its limitations. It is for that reason that an attempt to limit the full impact of the constitutional privilege must be rejected by this Court. We think the dissenting Justices in *Brown* v. *Walker* had a more appropriate conception of the need to give a liberal and protective construction to the Fifth Amendment than did the majority of the Court in that case. It is time to return to the original meaning of the Constitution. Otherwise, as has been so well said, there may result "a permanent reorientation of the individual citizen in his historic relationship to government and organized society." (O'Brian, *National Security and Individual Freedom* (1955), 1).

IV

This is the first time since the decision in *Brown* v. *Walker*, 161 U. S. 591 (1896), that this Court is asked to re-examine and limit the rule of that case. The statement in the Government's brief (p. 14) that "The doctrine of *Brown* v. *Walker* has also been reinforced over the years by the consistent opinions and holdings of this Court" is incorrect.

In no case after *Brown* v. *Walker*, did counsel argue that the Fifth Amendment prohibited compulsory testimony despite a broad federal immunity law; nor did this Court have occasion to discuss the question.

The cases cited by the Government may be classified as those: (a) where the witnesses testified and then claimed immunity;[1] (b) where the witness' refusal to testify was upheld;[2] (c) where the validity or applicability of a state immunity law was in issue;[3] (d) where the constitutional privilege was not properly asserted;[4] (e) where the witness prosecuted for refusing to comply with a subpoena objected to the use in contempt proceedings of the testimony constituting contempt;[5] (f) where the witness acquiescing in the rule of *Brown* v. *Walker* challenged its applicability because of a differently worded immunity law.[6]

This case is not only a proper, it is the first occasion for this Court to review the meaning of the constitutional privilege in connection with immunity laws in the First Amendment area.

All of the previous federal immunity laws which reached this Court were in the field of economic regulation. None

---

[1] Immunity claims were upheld in *United States* v. *Monia*, 317 U. S. 424; *Smith* v. *United States*, 337 U. S. 137; *Adams* v. *Maryland*, 347 U. S. 179; and rejected in *Burrell* v. *Montana*, 194 U. S. 572; *Glickstein* v. *United States*, 222 U. S. 139; *Heike* v. *United States*, 217 U. S. 423, 227 U. S. 131; *Shapiro* v. *United States*, 335 U. S. 1; and *Feldman* v. *United States*, 322 U. S. 487.

[2] *McCarthy* v. *Arndstein*, 266 U. S. 34; *Hoffman* v. *United States*, 341 U. S. 479.

[3] *Jack* v. *Kansas*, 199 U. S. 372; *Regan* v. *New York*, 349 U. S. 58.

[4] *United States* v. *Murdock*, 284 U. S. 141.

[5] *United States* v. *Bryan*, 339 U. S. 323.

[6] *Hale* v. *Henkel*, 201 U. S. 43.

of these statutes placed the citizens of this country under the apprehension of being compelled, under penalty of conviction of contempt of court, to testify privately and publicly as to their political associations and convictions.

V

Throughout its brief, the Government shows complete unawareness of the nature of our times and of the attacks on civil liberties which threaten to change the very nature of our government. The immunity Law and the persecution of petitioner are incidents in that attack; it is because of the broader picture that petitioner's arguments are sound.

Perhaps it is because the Government cannot or will not see the engulfing forest of oppression, that it concentrates so intently on the trees. Such meticulous attention to legalisms is inappropriate enough in consideration of any constitutional law question; it is completely out of place here. We could not reply to each of the Government's misconceptions without a line-by-line refutation of its brief; a few illustrations will serve to make our point.

The Government speaks of protecting the witness "from disgrace and infamy" (Gov't Br. p. 18); we argue that he is entitled to protection against outlawry. (See Taylor, *Grand Inquest* (1955).) Similar misleading understatement is found in the Government's reference to "the great investigations of the past" (Br. 19). Such a statement shows a complete lack of comprehension of the effect on our democracy of the past eight years.

So too, the Government discusses the perjury issue in a vacuum, as though petitioner sought a general rule protecting witnesses against perjury. But here, petitioner claims, the objective of the grand jury investigation is to furnish the basis for a perjury indictment against him, in

this setting, and in *this* political climate." As proof of that, he refers to the facts presented to the District Court, most of which are matters of public knowledge, and which add up to a truly ominous picture in the world of 1955. If petitioner may not look to the courts and to his Constitution for protection against such oppression, where may he look? The assumption that the Government is acting in good faith (p. 69) is small comfort to the petitioner; his own personal experience gives him little reason for feeling that the assumption is justified, and the Government's brief (p. 22) does nothing to assuage his fears.

As for the Government's quotation of Lord Chancellor Hardwicke's words that "The public has a right to every man's evidence" (Br. 20; 12 Cobbett's Parliamentary History of England 693, Debate in the Lords on the Bill to Indemnify Evidence against Robert Earl of Oxford, May 25, 1792), those words, read in their full context, take on a meaning precisely opposite to that which the Government, misled by Wigmore's incomplete quotation, supposes them to have. For the Lord Chancellor, opposing the immunity bill at issue and refuting the arguments of the Duke of Argyle, who had spoken in favor of the bill, reasoned as follows:

> "It has, my lords I own, been asserted by the noble duke, that the public has a right to every man's evidence, a maxim which in its proper sense cannot be denied. For it is undoubtedly true, that the public has a right to all the assistance of every individual; but it is, my lords, upon such terms as have been established for the general advantage of all. . . ."

[1] Cf. Love, *Statutes of Limitations in Criminal Law: the Perjury Dilemma*, 16 Ohio S. L. J. 219 (1955).

[2] "Even if the immunity determination had been vested in the United States Attorney, the district Court nevertheless has both duty and power to review for abuse of discretion. Cf. *Accardi v. Shaughnessy*, 347 U. S. 260; *Hecht Co. v. Bowles*, 321 U. S. 321; *Lee Fung v. Brownell*, 215 F. 2d 683; *United States ex rel. Francolus v. Shaughnessy*, 210 F. 2d 572 (C. A. 2, 1954); *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999 (C. A. 2, 1950)."

> "In the present case, my lords, the public has not a right to have evidence, because the public has hitherto subsisted upon this condition, among others, that no man shall swear in his own cause. The public has not a right to require from any man that he should betray himself, because every man may plead he is exempted from that demand by the public faith."[1]

It has become routine in our times for the Government to justify its disregard of the civil rights of the people, by taking refuge in the argument that its action is justified by the requirements of national security; the disabilities of the political dissenter, so pervasive in our time (see Petitioner's Brief, pp. 15-29) are but "prophylactic measures." The argument is not new to history. It was the justification for the excesses of the Star Chamber and the French Revolution. Similar arguments are made to excuse every wrong by a government, from the Inquisition to the refusal of Mississippi to desegregate its schools. If such contention can destroy the Bill of Rights, it offers no protection at all in times when protection is needed.

VI

The Government disingenuously suggests that if these sanctions are grounds for asserting the privilege, the petitioner is protected because they are then penalties and forfeitures within the meaning of the Immunity Act (Br. 27-28). To this there are two answers:

(1). Congress in passing this statute did not contemplate immunity of the kind referred to. It passed this law in

[1] Earlier the Lord Chancellor had said:

> "The public is indeed intitled (sic) to the evidence of every man, but not to every method of coming at that evidence. It is not intitled (sic) to the evidence of a man who may gain or lose by his evidence."

12 Cobbett's Parliamentary History of England, 652 (Secker Manuscript 1742).

the face of a reminder by opponents of the bill that the witnesses would be subject to precisely these sanctions (H. Rep. No. 2606, 83d Cong., 2d Sess., p. 12).

(2). It is impossible realistically to give the witness a protection against the disabilities which are imposed by such statutes as the Intesnal Security Act, the Magnuson Act, and the passport security regulations.

Congress has explicitly authorized many of these sanctions and disabilities, and it would require more than an immunity law phrased in the traditional language to render nugatory the substantive "anti-subversive" legislation.

The Government's discussion of a prosecution for "future criminal acts", fails to take a definite position with respect to the meaning of the Immunity Act. It says that the Act "is *susceptible* of a construction consistent with the view" that "prosecution for crime committed after compulsion of testimony can in no way be aided by the disclosures". This reasoning follows the pattern of the Government's brief by declining to ascribe any intent to Congress except an intent to comply with this Court's determination of what would be constitutional.

Whatever may be the right of this Court to construe ambiguous legislation in the light of constitutional problems, it will not attribute to Congress a fictitious intention to make a statute constitutional. This is a delegation of legislative power to the judiciary which is becoming more and more frequent as Congress passes laws close to the contours of its constitutional power.

The Government suggests that this is not the time to construe the scope of the Immunity Act's protection (Br. 31). Petitioner has refused to answer questions put to him because he asserted that the scope of the immunity was constitutionally inadequate. It is absurd therefore to suggest that his conviction should be affirmed leaving the determination of the scope of immunity to some future time.

VII

The Government refers to "a series of cases culminating in *United States* v. *Murdock*" (Br., 31) purporting to show the indifference of the Federal Government in immunity cases to the danger of state prosecution for crime.

This problem first arose in *United States* v. *Saline Bank*, 1 Pet. 100, where Chief Justice Marshall rendered the following opinion:

> "This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.
>
> The court below decided in favor of the validity of the plea, and dismissed the bill.
>
> It is apparent that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it."

The suggestion in *Hale* v. *Henkel*, repeated by the Government in its brief, (Br., 33) that the federal court in the *Saline* case was administering state law, is not the point of Chief Justice Marshall's opinion and is not even mentioned in the second significant case, *Ballmann* v. *Fagin*, 200 U. S. 186, which the Government erroneously dismisses as dictum (Br., 33).

Ballmann had refused to produce a cash book and answer questions before a federal grand jury and advised the Court in contempt proceedings that he had been charged with conducting a bucket shop in violation of Ohio Law. Mr. Justice Holmes noted the existence of danger under both federal and state law and stated the witness' belief that the books "if produced * * * would criminate him in one of the two ways which we have explained."

But *Hale v. Henkel*, 201 U. S. 43, 68 relied upon by the Government (Br. 33) is no more than dictum. The appellant there argued that the immunity law therein did protect against state prosecution in violation of the Tenth Amendment (Appellant's Br. 58 *et seq.*), and the Government argued that the law did guaranty the witness against state criminal prosecution (Appellee's Br. 72).

Except for the *Saline* and *Ballmann* cases, *supra*, this Court did not decide the issue squarely until the first *Murdock* case, 284 U. S. 141 (1931). (See *United States* v. *Murdock*, 290 U. S. 389, 396).

In the first *Murdock* case the issue went by default. For while Murdock had referred in the administrative proceedings to the danger of state prosecution, his formal pleading asserted only the danger of "prosecution in this Federal Court" (*United States* v. *Murdock*, 284 U. S. 141, Record, p. 15). His brief cites neither the *Saline* nor *Ballmann* cases and relies exclusively upon the danger of federal prosecution (Appellee's Br., pp. 5, 6, 22, and 23). This Court itself stated: "Nothing of state concern was involved" (284 U. S. at 149). It is little wonder that the Government's forceful presentation of this issue in its brief (Appellant's Br., p. 2) was successful.

The Government here again offers us an elastic construction of the statute by stating that "Congress certainly intended to cover state prosecutions, *if it could*" (Br. 34, italics supplied). This is a most peculiar way of construing legislation. It is one thing to say for example that a federal agency has jurisdiction over matters affecting interstate commerce, leaving to the courts the judicial determination of whether a particular business falls under that rubric (see *e.g.*, *National Labor Relations Board* v. *Jones & Laughlin Co.*, 301 U. S. 1); that is a judicial function. It is quite another for a statute to have alternative legal meanings, the appropriate one to be selected by this Court in its discretion.

Certainly the first witness under a statute, written, as it were, in the alternative, is denied due process of law, if he is promised an immunity of whose scope Congress itself is ignorant until this Court speaks. But our argument goes beyond the petitioner in this case. It is the duty of the legislature to confront a witness and the courts with a single statute, not a choice of statutes. If the result is unconstitutional, Congress has the power to enact a new law, to meet this Court's views on constitutionality.

Adams v. *Maryland*, 347 U. S. 179 (1954), settles the power of Congress to protect its witnesses against the use by the states of their federally compelled testimony. That is very different from the power of Congress to immunize the witness against state prosecutions. The concurring opinion of Mr. Justice Jackson in the *Adams* case makes the distinction clear. Therefore it is incorrect to suggest that "the roots of the Adams decision * * * likewise support the authority of Congress to prohibit all state prosecutions relating to the subject matter of the compelled testimony" (Br. 35).

Our main brief has sufficiently indicated our doubts as to the ability of Congress to enjoin state prosecutions. Where it is not Congress who is doing the enjoining but two Federal prosecutors, the doubts are reinforced. * * *

The suggestion in the Government's brief that the crimes covered by the 1954 Act "are within the *federal government's* special domain," makes strange reading in the light of its argument elsewhere:

> "It is the position of the United States that the federal government has a paramount but not exclusive interest in the prevention of sedition; that under our federal system the states have the power to punish acts of sedition committed within their respective jurisdictions; *and that Congress has done nothing to limit or suspend the exercise of that power.* * * *" (Brief for the United States As Amicus Curiae in *Commonwealth* v. *Nelson*, No. 10, this Term, italics supplied).

The Government, in seeking to meet petitioner's argument that the Congress intended to require Court approval of a grant of immunity in cases arising out of grand jury investigations (as it most certainly did in cases arising out of Congressional investigations), has ignored much of the background referred to by petitioner.[1]

The most important element in the legislative history, not even mentioned by the Government, is the treatment given to the Keating bill (H. R. 6899) by the House Judiciary Committee.

---

[1] The Government at page 41 of its brief points out that the petitioner omitted certain language from the report of the House Committee. We regret if this inadvertence has caused any inconvenience. The entire passage in question reads as follows:

> "Finally, before the immunity is actually granted to the witness, the approval of the United States district court wherein the inquiry is being conducted is to be obtained. The court in reaching its decision will have the aid of the views and facts of both the congressional committee and the Attorney General.
>
> The mere recital of these required procedures should clearly indicate that the possibility of an 'immunity bath' is definitely eliminated.
>
> In cases before a grand jury or a court, similar precaution exists. In such instances, if a United States attorney decides that in an authorized matter immunity should be granted to a witness who has claimed his privilege, that prosecutor, having adjudged such testimony to be necessary in the public interest, must first obtain the approval of the Attorney General for such grant and then apply to the court for the necessary instruction to the witness to testify or produce evidence. All conditions must be complied with before the grant of immunity can be given to the witness.
>
> In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill."

That bill, after describing the procedures to be followed in granting immunity in cases pending before Congressional Committees, provided in subdivision (b):

> "Whenever in the judgment of the Attorney General the testimony of any witness * * * in any case or proceeding before a grand jury * * * is necessary in the public interest, such witness shall not be excused from testifying * * * on the ground that the testimony or evidence * * * required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify * * *."

Subdivision (c) of H. R. 6899 provided that the judgment of the Attorney General as to the necessity to testify should be confirmed in writing addressed to the grand jury concerned.

Had the bill been passed, the procedure followed here would have been proper. The Attorney General would have filed (as he did) his approval of the grant of immunity, and upon the continued refusal of the witness to testify, the court would have directed the witness to answer. No legislation, of course, was necessary to require such court direction; it was required long before the passage of the Immunity Act and the reasons for it are fully discussed by the Court in *Carlson* v. *United States*, 209 F. 2d 209 (C. A. 1, 1954). Continued refusal of the witness, after such direction, would have resulted in a conviction for contempt.

But H. R. 6899 was dropped in committee and a new bill substituted. Aside from some verbal changes,[1] the two most important changes were: (1) the kinds of cases in which immunity could be granted were limited to so-called "national security" cases; and (2) the combined judgment

[1] Such as adding the requirement that the United States Attorneys approve a grant of immunity.

of the United States Attorney and the Attorney General was limited by the *additional* requirement of Court action.

The Government would make the latter of these changes a meaningless gesture since the Court's direction to the witness (as distinguished from Court approval of the grant of immunity) would have been required even under H. R. 6899 (Pet. Br. 39). None of the federal immunity statutes preceding the Immunity Act of 1954 was intended to delegate immunity power to the courts. Hence, none contained a provision for a court order. This difference in language cannot be disregarded.

In interpreting legislation, the Court should attempt to give meaning to all of the language used by Congress. This is particularly true when, as in the instant case, the language in dispute was added by Congress and an alternative bill omitting that language was rejected. *Brooks* v. *United States*, 337 U. S. 49.

We have pointed out (Pet. Br. pp. 41-43) that there was never any question in the minds of Congress or even in the mind of the Attorney General as to the meaning of this bill prior to the commencement of this litigation.

---

[1] Indeed the Solicitor General himself has, in other litigation, seemingly adopted our view of the law. Thus in the brief submitted to this Court only a few weeks ago in *Communist Party of the United States* v. *Subversive Activities Control Board*, Oct. Term 1955, No. 48, the Government's Brief states, at pp. 113-114, footnote 30:

> "It is true, as the Court observed, that under that [Immunity] statute the courts have broad power to grant immunity, upon the application of the Attorney General in proceedings before them involving violations of the statute here involved."

The Government was there referring to the decision of the Court of Appeals for the District of Columbia in *Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531 (C. A. D. C., 1955).

Perhaps consistency on the part of the Solicitor General is not required and we suppose that the views of the Court of Appeals in the *Subversive Activities Control Board* case which the Solicitor General adopted as his own views in the brief submitted to this

The statements of an executive officer as to his understanding of the meaning of legislation may not be binding on him, but such statements, where made immediately after the passage of a law with which he was critically concerned, cannot be ignored as an indication of what he thought Congress intended. Moreover, his views are but an echo of the views of the House manager of the legislation, made in the course of debate on the bill. "

Indeed it is difficult to see how the intent of Congress could have been expressed any more clearly than Representative Keating expressed it when he reported the bill to the House as providing "for the granting of immunity in both proceedings before congressional investigation committees and before courts or in grand jury proceedings, but it does not leave the final determination as to the granting of immunity in either the hands of the investigating committee or the Attorney General, but rather the court" (Pet. Br. 41-42).

Representative Keating was not expressing a casual, uninformed view; he was a member of the Judiciary Committee; he was the manager of the bill; he was the author of the bill which had been rejected. *Galvan* v. *Press*, 347 U. S. 522, 526-527.

The Government further argues that the Court could here apply the familiar doctrine that a constitutional construction of the statute should be preferred rather than one that raises serious doubts of constitutionality. "But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Where the intention of Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced

Court could not bind this Court in any event. We do suggest, however, that it seems that for *all* purposes, except this litigation, the Department of Justice has taken the position that under the terms of the Act the court is the agency which grants immunity in grand jury and court proceedings.

must answered." *Lucas v. Ice Cream Co. of Boise*, 280 U. S. 373, 379. See also *Hopkins Federal Savings & Loan Association v. Cleary*, 296 U. S. 315, 335.

Respectfully submitted,

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December, 1955.

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No. 758

In the Supreme Court of the United States

OCTOBER TERM, 1955

WILLIAM LUDWIG ULLMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 763

WILLIAM LUDWIG ULLMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals, not yet reported, are printed as an appendix to the petition (App. B). The opinion of the District Court granting the application of the United States Attorney under the immunity statute, Public Law 600, 83rd Cong., 68 Stat. 745 (1954), 18 U.S.C.A. § 3486 (Supp. 1954), for an order directing petitioner to testify is reported at 128 F. Supp. 617 and is printed in petitioner's appendix record (App. 36a).[1]

[1] The record filed by petitioner, the appendix to his brief as appellant in the Court of Appeals, is here referred to as "App." The two appendices to the petition are referred to as "App. A" and "App. B".

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1955 (App. B). The petition for a writ of certiorari was filed on May 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether section (c) of the immunity statute charges the district court with the duty of determining the propriety of granting immunity in order to compel the testimony of a witness and thereby imposes upon it a non-judicial function.

2. Whether an immunity statute which provides absolute immunity from prosecution in exchange for testimony is invalid under the Fifth Amendment.

3. Whether a federal immunity statute must afford immunity from state prosecution.

4. Whether questions relating to Communist affiliations of petitioner and others are improper as immaterial and violative of the First Amendment.

5. Whether the District Court's order is deficient for failure to contain a grant of immunity.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The immunity statute, Public Law 600, 83rd Cong., 68 Stat. 745 (1954); 18 U. S. C. A. 3486 (Supp. 1954), is set forth as an appendix to the petition (App. A).

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

On November 3, 1954, petitioner appeared before a grand jury in the Southern District of New York. This grand jury was inquiring into matters involving the interference with and endangering of, and plans and attempts to interfere with and endanger, the national security and de-

fense of the United States by espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere. Petitioner refused to answer various questions relating to the subject matter of the inquiry, asserting his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States.

On November 10, 1954, the United States Attorney for the Southern District of New York presented to the District Court an application for an order instructing petitioner to testify and produce evidence pursuant to section (c) of the immunity statute, 18 U. S. C. A. § 3486, (Supp. 1954) (App. 2a). The application described the subject matter of the grand jury inquiry, set forth the questions asked petitioner by the grand jury, and stated that he refused to answer the questions on the ground that his answers would tend to incriminate him. The application averred that in the judgment of the United States Attorney the testimony of petitioner was necessary to the public interest and that the application was made with the approval of the Attorney General. It was accompanied by the latter's letter of approval (App. 7a).

Petitioner filed an affidavit in opposition to the application (App. 9a). Although, in the Government's view, this affidavit had no bearing upon the question before the court, counter affidavits were filed directed to certain charges which it

was felt should not go unanswered (App. 28a, 29a, 32a). Upon the request of the court, the United States Attorney filed an affidavit of good faith (App. 8a).

On January 31, 1955, after argument and the submission of briefs and the above affidavits, the court handed down an opinion sustaining the constitutionality of the immunity statute and granting the application (App. 36a). An order dated February 8, 1955, was issued by the court directing petitioner to appear before the grand jury and, pursuant to the statute, to answer the questions and testify and produce evidence with respect to the matters under inquiry (App. 55a).

On March 8, 1955, after persisting in his refusal to answer the questions put to him by the grand jury, petitioner was adjudged in contempt. The court entered judgment sentencing him to six months' imprisonment with the right to purge (App. 68a).

The Court of Appeals affirmed the judgment of the District Court in an opinion by Judge Frank expressly adopting the reasoning and conclusions of the District Court's opinion, with concurring opinions by Judge Clark and District Judge Galston (App. B). While the opinions expressed doubts as to the result as an original proposition, all held that the case was concluded by *Brown* v. *Walker*, 161 U. S. 591, and subsequent decisions of this Court.

ARGUMENT

1. Petitioner contends first (Pet. 6–11) that the immunity statute calls upon the district court to determine the propriety of granting immunity, that such a determination is a non-judicial function, and that the statute is therefore invalid. The argument, which strains after constitutional doubts from which the statute is free on its face, is without merit.

In unambiguous language, section (c) makes clear that the district court has no such function as petitioner suggests. To summarize its essential features, it provides: (1) There must be a proceeding before a grand jury or a case in the district court; (2) the subject matter must relate to interference with or endangering of, or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the like; (3) it must appear that in the judgment of the United States Attorney the testimony of a witness regarding such matters is necessary to the public interest; (4) the United States Attorney, with the approval of the Attorney General, shall make application to the court requesting that the witness be required to testify; and (5) upon order of the court the witness shall not be excused from testifying or producing evidence. Then follows the provision that the witness shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any

transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence.

There is no suggestion that after an application has been made in accordance with the statutory conditions outlined above, the district court is required or empowered to review the judgment of the United States Attorney or the Attorney General that the granting of immunity is appropriate. Nor, indeed, is the court required to grant immunity, for the immunity has been granted by Congress itself in the terms of the statute. Immunity follows as a matter of law when all the conditions have been met and the witness has testified in compliance with the order of the court.

In the absence of a statute granting immunity from prosecution to a witness who has validly asserted his privilege against self-incrimination, the courts lack power to compel him to answer. Under the present statute, the court is empowered to order the witness to answer when it appears (1) that the conditions specified in the statute and outlined above exist and (2) that there is no other legal objection to the compulsion of the witness' testimony. The order of the court gives assurance that the immunity power will not be dissipated in cases outside the framework of the congressional intent and that the witness will be

protected from subsequent prosecution touching the matters about which he is being compelled to testify. This construction of the statute, adopted by both courts below and plainly required by its language,[2] eliminates the need to consider the asserted constitutional problem which would arise if there were ground for the suggestion that the district court is called upon to determine the propriety of granting immunity.

The legislative history of the statute cannot justify petitioner's contrary conclusion. Nowhere in that history, which is reviewed in detail in the opinion of the district court (App. 49a–52a), is there any indication that Congress intended to require or permit a district court to substitute its judgment for that of the Attorney General and the United States Attorney as to whether the testimony of a witness before a grand jury is sufficiently necessary to warrant immunity. This may be readily illustrated by examination of the brief quotations petitioner selects (Pet. 7, 8) from the report on the bill which was enacted, H. Rep. No. 2606, 83d Cong., 2d Sess. The first of these quotations (Pet. 7), from p. 4

[2] Although sections (a) and (b) of the statute, dealing with witnesses before Congress or its committees, are not in this case, a comparison of them with section (c) underscores our position. As the district court observed (App. 46a–47a), these sections, providing that a court "may" issue an order and that an order requires the "approval" of the court, can be said to purport to vest discretion in the court (App. 46a–47a). There is no comparable language in section (c).

of the Report, merely affirms that the measure requires "application * * * to a court" an undisputed proposition which is of no help to petitioner. Petitioner then quotes from p. 8 of the Report where, with reference to witnesses *before committees of Congress*, it is said:

> Finally, before the immunity is actually granted to the witness, the approval of the United States district court wherein the inquiry is being conducted is to be obtained.

As we have noted (*supra*, p. 8, n. 2), this observation is, if anything, adverse to petitioner's view since the provision regarding witnesses before grand juries significantly omits any requirement of "approval" by the district court. Nor, finally, is petitioner aided by his last quotation (Pet. 8), which consists of only the first sentence of the following paragraph from p. 8 of the Report:

> In cases before a grand jury or a court similar precaution exists. In such instances, if a United States attorney decides that in an authorized matter immunity should be granted to a witness who has claimed his privilege, that prosecutor, having adjudged such testimony to be necessary in the public interest, must first obtain the approval of the Attorney General for such grant and then apply to the court for the necessary instruction to the witness to testify or produce evidence. All conditions must be complied with before the

grant of immunity can be given to the witness.

Read as a whole, this language hardly supports the thesis that the court is to have the duty of approving the propriety of granting immunity.

In short, as the district court concluded from its careful analysis (App. 52a), "The most that can be said for the legislative history is that it is on the whole inconclusive." On the other hand, the statute itself lends no support to the argument that constitutional doubt should be found by holding that the district court is required to judge the desirability from the viewpoint of the public interest of granting immunity. In the circumstances, the argument is decisively answered by the familiar teaching that "even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62; *United States* v. *Rumely*, 345 U. S. 41, 45; *United States* v. *U. I. O.*, 335 U. S. 106, 121. We think the construction found correct by the courts below is more than "fairly possible." It is the natural and reasonable import of the statutory language. But if the point were more doubtful, petitioner's effort to stretch the statute to the point of constitutional difficulty would remain futile.

2. The argument that the immunity statute violates the privilege against self-incrimination guaranteed by the Fifth Amendment is refuted by the decisions of this Court. Since *Brown* v. *Walker*, 161 U. S. 591 (1896), it has been firmly established that testimony may be compelled under a statute which affords "absolute immunity against future prosecution for the offence to which the question relates." *Counselman* v. *Hitchcock*, 142 U. S. 547, 586. The Act of 1893 upheld in *Brown* v. *Walker* served as the model for the statute here in issue as well as for immunity provisions appearing in a number of regulatory statutes. See *Shapiro* v. *United States*, 335 U. S. 1, 6. Recognizing that the statute here involved meets the established test, petitioner urges (Pet. 12) that *Brown* v. *Walker* should be overruled.

But, as all four of the judges below recognized (App. 39a, App. B, Pet. 23, 26, 27), the doctrine of *Brown* v. *Walker* not only remains unimpaired; it has been reenforced over the years by the decisions of this Court. *Hale* v. *Henkel*, 201 U. S. 43, 67-69; *United States* v. *Monia*, 317 U. S. 424, 428; *Smith* v. *United States*, 337 U. S. 137, 146-147; see, also, *Jack* v. *Kansas*, 199 U. S. 372; *Heike* v. *United States*, 227 U. S. 131; *Feldman* v. *United States*, 322 U. S. 487; *Shapiro* v. *United States*, 335 U. S. 1; *Adams* v. *Maryland*, 347 U. S. 179. And within the last month, subsequent to the decision of the court below, this Court (in *Regan*

New York, No. 54 this Term, slip op. p. 4) cited *Brown* v. *Walker* for the proposition that under the state immunity statute there involved (apart from the problem of waiver in that case), "it is clear beyond dispute that he would have had to testify; the statute would have provided him with immunity from prosecution on the matters on which his testimony was sought, and thus his testimony could not possibly have been self-incriminatory."

That conclusion controls this case. As in *Brown* v. *Walker* and in *Regan*, so here, the claim of constitutional privilege is defeated by the grant of immunity under which petitioner's testimony "could not possibly have been self-incriminatory." Because he was afforded the protection against self-incrimination the Constitution insures, petitioner could not refuse to answer questions on the ground of feared "legal, economic, social and political sanctions" (Pet. 12) any more than Regan could invoke the sanction of the strong public disfavor in which officials who deal in bribes are held. While one may not be forced to give testimony which may subject him to prosecution, it is also a salutary principle that, subject to this restriction, "the public has a right to every man's evidence."[3] Under the rule reaffirmed by this

[3] Lord Chancellor Hardwicke, in debate in the House of Lords (1742) on a Bill for Indemnifying Evidence, 12 Cobbett's *Parliamentary History* 675, quoted in 8 Wigmore, Evidence, § 2192 (3d ed., 1940).

Court only the other day in *Regan*, it is clear that petitioner, protected against prosecution by the immunity statute, was not free to withhold his testimony.

3. Petitioner contends that the immunity statute fails to confer complete immunity because it leaves him subject to state prosecution. He suggests (Pet. 13) that this problem "involves three preliminary determinations: (a) Does the constitutional privilege protect the federal witness against divulging matters tending to incriminate under state law; (b) Does the statute purport to and did Congress intend to prohibit state prosecutions; (c) Does Congress have such power under the Constitution?" However, the issue is sufficiently resolved by the answer to the first of these questions: the privilege against self-incrimination under the Fifth Amendment does not extend to possible incrimination under state law.

As petitioner recognizes (Pet. 14), this decisive point was established by a series of cases culminating in *United States* v. *Murdock*, 284 U. S. 141, where the Court said (p. 149):

> This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection

against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547. *Brown* v. *Walker*, 161 U. S. 591, 606. *Jack* v. *Kansas*, 199 U.S. 372, 381. *Hale* v. *Henkel*, 201 U. S. 43, 68.

As the Court pointed out, the principle applies not only to federal immunity statutes but to those of the states, which, of course, cannot and need not preclude federal prosecution to make the grant of immunity effective as a requirement to testify. See *Feldman* v. *United States*, 322 U. S. 487, 491–492; cf. *Regan* v. *New York*, *supra*.

Because the immunity statute need not bar state prosecution, it becomes immaterial to this case whether Congress has undertaken to do so. The question would require decision only if and when a state prosecuted petitioner for matters on which he testified in obedience to the order he has so far defied.[4]

4. Petitioner contends next (Pet. 15–16) that he could not be asked questions as to his Communist Party membership because (a) such in-

[4] Though the answer to this question is, in our view, unnecessary to its decision, the district court considered it at some length, concluding that Congress intended to and did bar state prosecution in the immunity statute here involved (App. 41a–45a).

quiry as forbidden by the First Amendment and (b) the questions were irrelevant to the grand jury's inquiry. Both branches of the argument are erroneous.

In support of his First Amendment claim, petitioner mistakenly attempts to dismiss as irrelevant the cases upholding the power of Congress to inquire into Communist Party membership. *United States* v. *Josephson*, 165 F. 2d 82 (C. A. 2), certiorari denied, 333 U. S. 838; *Lawson* v. *United States*, 176 F. 2d 49 (C. A. D. C.), certiorari denied, 339 U. S. 934; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.). There is nothing in the Amendment, however, to support the suggestion that such inquiry is necessarily forbidden to a grand jury in appropriate cases while it is permitted to a committee of Congress. The experience which teaches that Communist Party membership may be a highly significant fact in legislative investigations concerned with the national security is at least as pertinent for a grand jury, like the one here, inquiring into possible cases of espionage.

And this point disposes as well of petitioner's claim that such questions were irrelevant to the grand jury's business. It may be noted in this connection that the witness "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." *Blair* v. *United States*, 250 U. S. 273, 282; *Nelson* v. *United States*, 201 U. S.

92, 115; *United States* v. *McGovern*, 60 F. 2d 880, 888, 889 (C. A. 2). In any event, it was obviously most relevant to the grand jury's investigation into whether individuals furnished unauthorized information to the Soviet Union to ascertain if such individuals were members of the Communist Party during the period when the information was allegedly furnished. It is difficult to think of a circumstance which would more clearly reflect motive for furnishing such information than membership in an organization which is believed, on powerful evidence, to be part of an international conspiracy centered in the Soviet Union. See, *e. g.*, *Dennis* v. *United States*, 341 U. S. 494; *Communications Assn.* v. *Douds*, 339 U. S. 382, 422 *et seq.* (Mr. Justice Jackson, concurring and dissenting, each in part). It was clear from the very first question propounded to petitioner (App. 3a) that the grand jury was seeking to ascertain what knowledge he had concerning a conspiracy to transmit national defense information to members of the Communist Party and thence to agents of a foreign power during World War II. His testimony relative to his own membership and that of others went to the very heart of the allegations being considered by the grand jury. Petitioner's observation (Pet. 16) that membership in the Communist Party is not a crime is beside the point. Plainly, the bounds of a grand jury's power are not limited to re-

quiring testimony which in itself affirms or denies the commission of a crime. It is equally plain that the testimony petitioner withheld was properly sought by the grand jury in this case.

5. Finally, it is argued (Pet. 16-17) that the district court's order is invalid for failure to contain an express grant of immunity. As we have noted earlier, however (*supra*, p. 7), the immunity has been granted by Congress itself in the terms of the statute. It arises by operation of law when all of the conditions specified in the statute have been met and the witness has testified in compliance with the court's order. This being true, there is no necessity for a grant of immunity in the order itself. At the outset, the order recites that the United States Attorney has made application for an order instructing the appellant to testify "pursuant to the provisions" of the immunity statute (App. 55a). The order specifically states that petitioner is ordered to testify "subject to the provisions" of the immunity statute (App. 57a). Clearly, he is being compelled under the statute and is protected by the statutory immunity from subsequent prosecution touching the subject matter of his testimony. There was no necessity for the court to redefine the immunity in its order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

WILLIAM LUDWIG ULLMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

[redacted]

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OPINIONS BELOW

The opinions in the Court of Appeals (R. 55-60) are reported at 221 F.2d 760. The opinion of the District Court (R. 28-44) granting the application of the United States Attorney under the Immunity Act of 1954 (68 Stat. 745, 18 U.S.C. 3486 (Supp. II)) for an order directing petitioner to testify is reported at 128 F. Supp. 617. There was no opinion rendered by the District Court adjudging petitioner guilty of contempt for refusing to comply with the order.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1955 (R. 60). The petition for a writ of certiorari was filed on May 2, 1955, and was granted on June 6, 1955 (R. 61). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Immunity Act of 1954 (Public Law 600, 83d Cong., 68 Stat. 745, 18 U.S.C. 3486 (Supp. II)) is set forth in the Appendix to this brief, *infra*, pp. 52-55.

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a wit-

ness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

QUESTIONS PRESENTED

1. Whether the Immunity Act of 1954, which provides absolute immunity from federal prosecution in exchange for testimony, is invalid under the Self-Incrimination Clause of the Fifth Amendment.

2. Whether Section (c) of the Immunity Act of 1954 charges the District Court with the duty of determining the propriety of affording immunity to petitioner in exchange for his testimony and thereby imposes upon it a non-judicial function.

3. Whether questions relating to Communist affiliations of petitioner and others are proper and violative of the First Amendment when asked in a grand jury inquiry into espionage committed on behalf of the Soviet Union during time of war.

4. Whether the order of the District Court that petitioner testify pursuant to the provisions of the Immunity Act of 1954 is deficient for failure to contain an express grant of immunity.

STATEMENT

On November 3, 1954, petitioner appeared before a grand jury in the Southern District of New York. This grand jury was inquiring into matters involving interference with and endangering of, and plans and attempts to interfere with and endanger,

the national security and defense of the United States by espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere. Petitioner refused to answer various questions relating to the subject matter of the inquiry, asserting his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States.

On November 10, 1954 (R. 4), the United States Attorney for the Southern District of New York presented to the District Court an application for an order instructing petitioner to testify and produce evidence pursuant to Section (c) of the Immunity Act of 1954, 18 U.S.C. 3486 (Supp. II) (R. 1). The application described the subject matter of the grand jury inquiry, set forth the questions asked petitioner by the grand jury, and stated that he refused to answer the questions on the ground that his answers would tend to incriminate him. The application averred that, in the judgment of the United States Attorney, the testimony of petitioner was necessary to the public interest and that the application was made with the approval of the Attorney General. It was accompanied by the latter's letter of approval (R. 5).

Petitioner filed an affidavit in opposition to the application (R. 7). Although, in the Government's view, this affidavit had no bearing upon the question before the court, counter affidavits were filed directed to certain charges which it was felt should not go unanswered (R. 22, 23, 25). Upon the request of the court, the United States Attorney filed an affidavit of good faith (R. 6).

After argument and the submission of briefs and the above affidavits, the District Court handed down an opinion, dated January 31, 1955 (R. 44), sustaining the constitutionality of the immunity statute and granting the application (R. 28). An order, dated February 8, 1955, was issued by the court directing petitioner to appear before the grand jury and, pursuant to the statute, to answer the questions and testify and produce evidence with respect to the matters under inquiry (R. 44).

On March 8, 1955, after persisting in his refusal to answer the questions put to him by the grand jury, petitioner was adjudged in contempt. The court entered judgment sentencing him to six months' imprisonment with the right to purge (R. 53).

The Court of Appeals affirmed the judgment of the District Court in an opinion by Judge Frank, expressly adopting the reasoning and conclusions of the District Court's opinion (R. 55), with concurring opinions by Judge Clark and District Judge Galston (R. 59, 60).

SUMMARY OF ARGUMENT

I

The Immunity Act of 1954 does not violate the Self-Incrimination Clause of the Fifth Amendment since it provides immunity co-extensive with the constitutional privilege against self-incrimination.

A. Ever since the classic case of *Brown v. Walker*, 161 U.S. 591 (1896), it has been estab-

lished that testimony may be compelled under a statute which affords absolute immunity from prosecution. Petitioner first asks that *Brown* v. *Walker* be overruled, but the principle there set forth has been recognized and enforced by this Court in case after case, without the slightest suggestion on any part that it is unsound. The most recent decision following *Brown* v. *Walker* is *Regan* v. *New York*, 349 U.S. 58, decided in April 1955. In reliance upon these cases, Congress has enacted a large number of immunity statutes, so that almost every major piece of federal regulatory legislation now contains a compulsory-testimony-plus-immunity provision. Petitioner's challenge to the *Brown* case mainly reiterates arguments considered and rejected in 1896; these contentions cannot overcome the long-continued acceptance by Court and Congress, of the immunity principle.

1. At this late date, the meaning of the privilege cannot be determined from a literal interpretation of the brief formula identifying the privilege in the Constitution, as precluding any compulsory testimony even under promise of immunity. The Self-Incrimination Clause must be interpreted in the light of its history, purpose, and development.

2. In that light, the Fifth Amendment privilege is solely a privilege not to give testimony which would tend to subject one to federal prosecution for a prior criminal act. E.g., *Hale* v. *Henkel*, 201 U.S. 43; *United States* v. *Murdock*, 284 U.S. 141. Neither the common-law nor the constitutional privilege protects against disgrace or infamy, as is

illustrated by the settled rule that if prosecution for crime is barred by limitations the witness must testify. Accordingly, a statute which affords immunity from prosecution automatically satisfies the privilege and the Self-Incrimination Clause no longer bars the compulsion of testimony.

3. Similarly, the constitutional privilege does not protect against perjury committed while testifying, and therefore a federal immunity statute need not bar prosecution for perjury committed in testifying under its compulsion. *Glickstein* v. *United States*, 222 U.S. 139. It could not be otherwise. The power to compel testimony would be a nullity were there no right to require that the testimony be given under such safeguards as to compel it to be truthful. Ordinary witnesses may not refuse to testify on the ground that their testimony may leave them open to prosecution for lying under oath, and, once immunity has been granted, petitioner is in no different position than an ordinary witness.

4. Petitioner urges that the rights of "political and religious dissent" require a reevaluation of the Self-Incrimination Clause and of *Brown* v. *Walker*. But the questions asked petitioner were not idle probing into political beliefs; they concerned actual espionage on behalf of a foreign power—an undoubtedly serious crime comparable in every way to those with which Congress has heretofore dealt in immunity legislation.

B. Petitioner's second main contention is that his compelled testimony may reveal information

resulting in the imposition on him of various federal, state, and private "disabilities" of a non-criminal nature. Since in his view the 1954 Act does not protect against these "disabilities" or "sanctions" it is invalid.

1. The possible "disabilities" petitioner lists (Pet. Br. 16-19) are not punitive or criminal sanctions; they all fall into the class of prophylactic measures designed to remove dangerous or unsuitable persons from positions in which they can do harm, *e.g.*, removal from public employment. Such preventive measures have never been considered to be penalties or forfeitures within the Self-Incrimination Clause. Moreover, petitioner makes no showing at all that the imposition of these measures is anything but an "imaginary possibility" so far as he is concerned.

2. However, if petitioner is right in arguing that these "sanctions" are penalties or forfeitures under the Fifth Amendment, then the 1954 Act will protect him, should the occasion arise, since its immunity clause is as broad as the constitutional privilege.

C. A federal immunity statute need not bar prosecution for future criminal acts. The privilege itself has no relation to future criminal acts which may or may not be committed. *United States* v. *Kahriger*, 345 U.S. 22; *Lewis* v. *United States*, 348 U.S. 419. Whether prosecution for crime committed after compulsion of testimony may be aided by the compelled disclosures is not before the Court at present. However, the Im-

munity Act of 1954 is sufficiently broad to prevent any use of compelled disclosures if at some future time that issue should present itself for determination in a proper case.

D. To be valid, a federal immunity statute need not bar state prosecutions. *United States* v. *Murdock*, 284 U.S. 141; cf. *Feldman* v. *United States*, 322 U.S. 487. It becomes immaterial to this case, therefore, whether Congress has undertaken to do so in the present statute. Nevertheless, after considering the question at some length, the District Court concluded that Congress intended to and did bar state prosecution in the present statute. *In re Ullmann*, 128 F. Supp. 617; R. 32-35. If the question should be reached, we would support the position of the District Court (a) that Congress did bar state prosecutions, and (b) that Congress had the power to do so in a statute dealing with crimes against the national defense and security. Cf. *Adams* v. *Maryland*, 347 U.S. 179.

II

The Immunity Act of 1954 does not empower the court to approve the propriety of the United States Attorney's judgment that petitioner's testimony is necessary to the public interest. Therefore, the statute does not impose a non-judicial function on the court.

A. In unambiguous language, Section (c) (*infra*, pp. 53-55) makes clear that the District Court has no such function as petitioner suggests.

It provides: (1) there must be a proceeding before a grand jury or a case in the District Court; (2) the subject matter must relate to interference with or endangering of, or attempts to interfere with or endanger, the national security by treason, sabotage, espionage, sedition, seditious conspiracy or the like; (3) it must appear that in the judgment of the United States Attorney the testimony of a witness regarding such matters is necessary to the public interest; (4) the United States Attorney, with the approval of the Attorney General, shall make application to the court for an order directing the witness to testify; and upon such order, the witness shall not be excused from testifying or producing evidence. There is no suggestion that the court is required or empowered to approve or review the judgment of the United States Attorney and the Attorney General that the grant of immunity is in the public interest. The function of the court is only to order the witness to answer when it appears that the statutory conditions exist and that there is no other legal objection to the compulsion of his testimony.

B. The legislative history is inconclusive. The Report of the House Judiciary Committee supports our construction; there are a few statements in the debate tending the other way. On the whole, the history cannot justify petitioner's reading, and it does not require or warrant a construction other than that demanded by the plain language of the statute.

C. If there be doubt, the familiar teaching is that

"even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62; *United States* v. *Rumely*, 345 U. S. 41, 45.

D. Petitioner has no standing to attack the validity of the statutory provisions relating to *congressional* investigations. *Blackmer* v. *United States*, 284 U. S. 421; see *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, at 346-347. And even if it be assumed *arguendo* that Sections (a) and (b), relating to congressional investigations, are unconstitutional; Section (c) may stand and be enforced. *Dorchy* v. *Kansas*, 264 U. S. 286; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 598.

E. The District Court, having correctly construed the statute as not requiring it to review the judgment of the United States Attorney as to the public interest, did not err in failing to require that evidence be presented substantiating that judgment.

III

A. The grand jury's questions relating to Communist affiliations of petitioner and others were clearly relevant to its inquiry. It was obviously pertinent to an investigation into whether individuals furnished unauthorized information to the Soviet Union to ascertain if they were members of the Communist Party during the period in question. In any event, a witness is not entitled to urge objections of incompetency or irrelevancy,

such as a party might raise, for this is no concern of his." *Blair* v. *United States*, 250 U. S. 273, 282.

B. Since Congress may inquire into Communist Party membership in appropriate cases (*Lawson* v. *United States*, 176 F. 2d 49 (C. A. D. C.), certiorari denied, 339 U. S. 934; *United States* v. *Josephson*, 165 F. 2d 82 (C. A. 2), certiorari denied, 333 U. S. 838), there is nothing in the First Amendment to forbid such inquiry by a grand jury, especially where espionage on behalf of the Soviet Union is involved.

IV

The order of the District Court was issued pursuant to the provisions of the Immunity Act of 1954; it is an order to testify subject to the immunity provisions of that Act. There was no necessity for the court to redefine in its order the immunity so provided.

ARGUMENT

I

The Immunity Act of 1954 Does Not Violate the Self-Incrimination Clause of the Fifth Amendment

Since *Brown* v. *Walker*, 161 U. S. 591, decided in 1896, it has been thought to be established law that testimony may be compelled under a statute which affords "absolute immunity against future prosecution for the offence to which the question relates." *Counselman* v. *Hitchcock*, 142 U. S. 547, 586. The Compulsory Testimony Act of 1893, 27 Stat. 443, 49 U. S. C. 46, upheld in *Brown* v. *Walker*, served as the model for the present stat-

utes as well as for immunity provisions appearing in a large number of regulatory acts.

Petitioner first argues that *Brown* v. *Walker* should be flatly overruled and that all of this federal compulsory testimony legislation should be invalidated (Pet. Br. 11). Next, he attempts to show that the 1954 Immunity Act differs significantly from the prior statutes and runs afoul of the Fifth Amendment even if the legislation with which the Court has previously been concerned should still stand. On both counts, petitioner errs. The rule of *Brown* v. *Walker* is too deeply embedded in our constitutional jurisprudence to be cast aside at this time; and the present immunity statute does not differ in any relevant way from those which have long since been enacted by Congress and upheld by the courts.

A. *Brown v. Walker should not be overruled.*

It is now almost sixty years since *Brown* v. *Walker* was decided after most thorough consideration by the Court—as the three opinions demonstrate on their face. True, the decision was initially a close one but, like other notable divided rulings (*e. g.*, the *Legal Tender Cases*, 12 Wall. 457; 110 U. S. 421, 438; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1), this one achieved immediate and continued acceptance both in Congress and by the Court itself. Almost every major piece of federal regulatory legislation now contains a compulsory-testimony plus immunity provision modelled on the Interstate Com-

merce Commission statute upheld in 1896. See *Shapiro* v. *United States*, 335 U. S. 1, 6-7; 8 Wigmore, *Evidence* (3d ed. 1940) § 2281, n. 11, and supplement.[1] This device has been woven into the very warp and woof of public control of regulated activities.

As all four judges below recognized (R. 28, 31, 55, 59, 60), the doctrine of *Brown* v. *Walker* has also been reinforced over the years by the consistent opinions and holdings of this Court. See *Burrell* v. *Montana*, 194 U. S. 572, 578-9; *Jack* v. *Kansas*, 199 U. S. 372, 381, 382; *Hale* v. *Henkel*, 201 U. S. 43, 67-69; *Glickstein* v. *United States*, 222 U. S. 139, 141; *Heike* v. *United States*, 217 U. S. 423, 431-2, 227 U. S. 131, 141-4; *McCarthy* v. *Arndstein*, 266 U. S. 34, 42; *United States* v. *Murdock*, 284 U. S. 141, 149; *United States* v. *Monia*, 317 U. S. 424, 428, 433 ff; *Feldman* v. *United States*, 322 U. S. 487, 491; *Shapiro* v. *United States*, 335 U. S. 1, 28-29, 50; *Smith* v. *United States*, 337 U. S. 137, 146-148; *United States* v. *Bryan*, 339 U. S. 323, 336; *Hoffman* v. *United States*, 341 U. S. 479, 490; *Adams* v. *Maryland*, 347 U. S. 179. As recently as April 1955, *Regan* v. *New York*, 349 U. S. 58, 62, cited *Brown* v. *Walker* for the proposition that under the immunity statute there involved (apart from the problem of waiver), "it is clear beyond dispute that he [Regan] would have had to testify; the statute would have provided him with immu-

[1] Wigmore also lists the very large number of immunity statutes passed in England, Canada, and the several states of the United States.

nity from prosecution on the matters on which his testimony was sought, and thus his testimony could not possibly have been self-incriminatory."[2]

It is impossible, we believe, to read this line of cases without concluding that, ever since 1896, the Court and its individual members have accepted the rule of *Brown* v. *Walker* as an integral part of American constitutional law. There are no reservations of views, no queries, no hints of disagreement. Controversies have swirled around collateral problems, such as the scope of particular immunity clauses, but we have found no indication in this Court of less-than-full acceptance of the basic tenet that Congress can compel testimony by granting immunity from prosecution.[3]

In the light of this common and continued acceptance of *Brown* v. *Walker* by Congress and the Court, it should require much more than an appeal to Chief Justice Taney's famous remark on constitutional adjudication[4] to evoke a full *de novo* re-

[2] For comments on *Brown* v. *Walker*, see 8 Wigmore, *Evidence* (3d ed. 1940) §§ 2255, 2281; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 191, 197 (1930); Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 Geo. Wash. L. Rev. 447, 473 (1954); Note, 10 Harv. L. Rev. 120 (1896).

[3] In fact, the Court has itself suggested to Congress that, if it desires to compel complete disclosure, it can confer the power of unrestricted examination by providing complete immunity. See *McCarthy* v. *Arndstein*, 266 U.S. 34, 42; *Hoffman* v. *United States*, 341 U.S. 479, 490.

[4] In *The Passenger Cases*, 7 How. 283, 470:

> After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, how-

examination at this time of the settled doctrine which supports compulsory testimony legislation. In comparable cases, the practice of the Court has been to accept settled constitutional doctrine unless strong and special reasons for revision are presented. Cf. *e. g., Galvan* v. *Press*, 347 U. S. 522; *Society for Savings* v. *Bowers*, 349 U. S. 143; *Blau* v. *United States*, 340 U. S. 159; *United States* v. *Caltex, Inc.*, 344 U. S. 149. Here, aside from an assertion of changed conditions—a point we discuss below at pp. 19-20, 24-28—petitioner brings forward only arguments which were considered and rejected in 1896 and thereafter. In these circumstances, we believe it necessary to do no more than catalog his points and answer them summarily.

1. Petitioner first urges that the meaning of the Fifth Amendment privilege against self-incrimination should be determined solely by a literal construction of the words "No person * * * shall be compelled in any criminal case to be a witness against himself." To petitioner, the "literal meaning" of the language is that compulsory testimony is prohibited "regardless of the considerations offered" (Pet. Br. 10). However, read "literally",

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ever, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

See Brandeis J., dissenting in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 ff.

the privilege only has application to a criminal case, and then only to the accused. Petitioner would surely not insist on a literal reading if the result must be the denial of the privilege to a witness in a civil suit or before a committee of Congress or before a grand jury, as was petitioner. And even if the privilege be interpreted to extend to a witness other than the accused, petitioner is not helped. On its face the privilege is concerned solely with criminality. In that context, can it be said that an ordinary witness is compelled to be a "witness against himself", within the meaning of the privilege, where his revelations can in no way subject him to criminal prosecution?

The historical fact is, of course, that like all the great provisions of the Constitution the significance of the Self-Incrimination Clause "is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth". *Gompers v. United States*, 233 U.S. 604, 610; *Robertson v. Baldwin*, 165 U.S. 275, 281-2. Together with the comparable clauses in the state constitutions, the Fifth Amendment's self-incrimination provision has always been read in the light of the common-law privilege rather than as limited by the exact confines of a particular constitutional phraseology. See 8 Wigmore, *Evidence* (3d ed. 1940), § 2252. For instance, a witness is protected as well as an accused (*Counselman v. Hitchcock*, 142 U.S. 547); the privilege applies not only to criminal trials themselves but also to grand jury proceedings (*Blau v. United States*, 340 U.S.

159, 340 U.S. 332), and to appearances before congressional committees (*Quinn v. United States*, 349 U.S. 155, 161-2). Just as the clause has not been read literally in these decisions, so it is too late to stand upon the literal words of the Clause as the ground for invalidating compulsory-testimony legislation.

2. The contention that the constitutional privilege was intended to protect the witness from disgrace and infamy resulting from disclosures was last advanced by Mr. Justice Field in his dissent in *Brown v. Walker*, at pages 631-632. It finds no support in the development of the common-law privilege which is directed solely against prosecution for crime. See 8 Wigmore, *Evidence* (3d ed., 1940) §§ 2252-2261, especially § 2255; *Brown v. Walker*, 161 U.S. at 598. The Court has uniformly rejected disgrace or public approbrium as sufficient reason for invocation of the privilege. "It is not declared [by the Fifth Amendment] that he [a witness] may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply." *Hale v. Henkel*, 201 U.S. 43, 66-67. See, to the same effect, *Smith v. United States*, 337 U.S. 137, 147.

Congress has long been of the same view. As far back as 1862, it provided that no witness

was privileged to decline to testify or to produce papers before either House, or any committee "upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous". Act of January 24, 1862, 12 Stat. 333, R.S. 103, 2 U.S.C. 193.

Great stress is laid by petitioner (Pet. Br. 11-16) on what he asserts to be a vast difference between the public opprobrium to which he would be subjected today if his compelled testimony revealed a connection with espionage or sedition, and the obloquy suffered by the auditor in *Brown* v. *Walker* and the others whose testimony has been compelled under the many immunity statutes on the books. Although we can hardly agree that the validity of the 1954 Act should turn on a nice appraisal of degrees of odium, we do suggest that petitioner, with his eyes fixed on the present, has forgotten the impact of the great investigations of the past—federal, state, and municipal—which in their day stirred tremendous public interest and controversy. History does not support the claim to uniqueness. In any event, the more serious the revelation the stronger must be the expected reaction, and if the witness secures immunity the risk of public opprobrium "is a penalty which no reasonable man should be compelled to pay for the common good." *Brown* v. *Walker*, 161 U.S. at 606.

It may also be noted that even silence cannot protect petitioner from what he calls "the tyranny of public opinion". (Pet. Br. 20). Although the priv-

lege is the shield of the innocent as well as the guilty and no legal inferences may be drawn from its use, it is the plain fact that inferences are actually drawn by portions of the public. It may even be that, were petitioner to embrace immunity and truthfully answer the questions asked him, his standing with his fellows in the community would improve rather than suffer, as he assumes.

3. Like the witness in *Brown* v. *Walker* (see 161 U.S. at 622), petitioner also argues that if he is compelled to testify under the statute he will subject himself to the danger of a perjury prosecution based upon his compelled testimony. This, he says, denies him his constitutional privilege (Pet. Br. 23). However, the privilege is one permitting a person to refuse to give testimony which may tend to subject him to prosecution for a prior criminal act. If it were also to permit one to refuse to give testimony having no incriminating aspect for the reason that he might be prosecuted for perjury, it would become a privilege not to give testimony at all.[*] But our system of law rests on the fundamental duty of persons to testify so that truth may be ascertained by the tribunal as best it can. The "public has a right to every man's evidence," and no man should be allowed to refuse to perform that duty because he fears that others will not think his

[*] Lord Chancellor Hardwicke in the debate in the House of Lords on the Bill to indemnify Evidence; 12 Hansard's Parliamentary History of England, 675, 693, May 25, 1742, quoted in the dissenting opinion of Mr. Justice Frankfurter, *United States* v. *Monia*, 317 U.S. 424, 432; and in 8 Wigmore, *Evidence* (3d ed. 1940) § 2192 at p. 64.

testimony truthful. Certainly, the ordinary witness cannot win immunity from testifying on any such ground; nor can he justify resort to a plea of self-incrimination by claiming that his testimony is likely to be used as the basis for a perjury prosecution. See *e.g., United States* v. *Bryan*, 339 U.S. 323, 341-2.

Petitioner's position is not essentially different. He is not faced with any true dilemma. Like the ordinary witness (who claims no privilege against self-incrimination), he does not have to fear criminal prosecution for matters he reveals on the stand; but like the ordinary witness he is subject to a charge of perjury if he lies. For these reasons, it has been established that immunity statutes do not and need not bar prosecution for perjury committed while testifying under their compulsion. *Glickstein* v. *United States*, 222 U.S. 139;* *Cyan-cron* v. *United States*, 231 U.S. 710; see *United States* v. *Bryan*, 339 U.S. 323, 341; *Heike* v. *United States*, 227 U.S. 131, 141. "This must be the result, as it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful." *Glickstein* v. *United States*, *supra*, at p. 142.

Petitioner's imputation that our judicial proc-

* This, despite the fact that the immunity statute before the Court in *Glickstein* contained no clause, such as is found in the present statute (*infra*, p. 55a), expressly exempting perjury from its reach.

cases are being manipulated to bring unfounded charges of perjury in "political cases" to convict innocent persons when prosecutions "for such crimes as espionage, sedition and the like" will not lie (Pet. Br. 24-28), while devoid of legal relevance, should not pass unnoticed. Petitioner was not summoned before the grand jury in order to entrap him, but in order to obtain information considered necessary in a continuing investigation into espionage and other security violations. There is no reason to assume or to assert otherwise in this case, any more than in the hundreds of other cases in which inquiries are made or investigations are undertaken each day by the Federal Government. Such inquiries and investigations cannot be stopped by facile claims that the purpose is to lay a foundation for perjury charges against potential witnesses. The purpose of the Government's law officers, today as in the past, is to enforce the criminal law not to persecute or be vindictive. However, we need not remind the Court that perjury is a serious offense which may not go unpunished lest our system of justice suffer.

Moreover, the validity of a general statute like the Immunity Act of 1954 cannot pivot on allegations that a particular witness will be unfairly harried and mistreated. The Act is not directed at petitioner or limited to the present period; it is general in scope and indefinite in duration. It must be viewed as the permanent legislation it is, and not, as petitioner would have it, as a special persecutory device designed for his particular detri-

ment. All general legislation is potentially subject to abuse and here, as throughout the law, reliance must be placed on courts and public officials to prevent or forestall abuse and injustice in particular applications of general provisions. There is no call to void the statute outright because there may possibly be some harshness or oppression in its administration." See *United States* v. *Butler*, 297 U.S. 1, 87-88 (Mr. Justice Stone dissenting).

f. Petitioner also urges that the Court was led into error in *Brown* v. *Walker* by its over-concern for the regulation of corporate enterprise, thus disregarding the relationship of the Self-Incrimination Clause to political and religious dissent (which is said to be involved here) (Pet. Br. 9-12).[7] Whatever may be said of petitioner's recital of history, he surely cannot bring his case under the rubric of mere political dissent. The questions which were asked him, and as to which he was granted immunity, related to actual espionage, the transmitting of classified information to a foreign power (see R. 2-4, 46, 49). By no stretch of the imagination, and under no theory, can such matters be thought to be anything but serious crimes against the national security and defense. Espionage cannot be equated with free speech and "dissident be-

[7] Petitioner's argument that this Court must have been unaware of the claimed interests of "dissenters" is largely undermined by his own characterization of Judge Grosscup's decision in *United States* v. *James*, 60 Fed. 257, 264-5 (N.D. Ill.), as "prophetic" "of recent developments" (Pet. Br. 13-14). Judge Grosscup's ruling was considered by this Court in *Brown* v. *Walker* and was rejected. See 161 U.S. at 627-628.

liefs". If, as petitioner says, the Court was induced to decide *Brown* v. *Walker* by the then need to secure information in investigations under the Interstate Commerce Act, there is surely at least as great need and justification today for obtaining information in the area of espionage.

B. *The possible imposition on petitioner of non-criminal disabilities does not remove the 1954 Act from the rule of Brown* v. *Walker*

Petitioner points to various disabilities of a non-criminal nature to which he claims he might be subject were he to testify and contends that the 1954 Act is unconstitutional for failure to protect him against them (Pet. Br. 15-20). In this respect, he says, his situation differs markedly from that of the recalcitrant witness in *Brown* v. *Walker*.

Petitioner does not urge that these disabilities are criminal in nature, nor can he. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537; *Helvering* v. *Mitchell*, 303 U.S. 391; *Amato* v. *Porter*, 157 F. 2d 719 (C.A. 10), certiorari denied, 329 U.S. 812. What he does urge is, *first*, that these sanctions, though non-criminal, nevertheless furnish sufficient reason for invoking the privilege against self-incrimination (Pet. Br. 19), and, *second*, that the 1954 Act does not grant immunity against the imposition of these sanctions (Pet. Br. 18). It follows, in petitioner's view, that he is still free to invoke the privilege because the immunity granted by Congress is not as broad as his constitutional privilege. Cf. *Counselman* v. *Hitchcock*, 142 U.S.

547; *Smith* v. *United States*, 337 U.S. 137, 149-7. To prevail on this point, petitioner must sustain both of his propositions.

1. The privilege accorded by the Fifth Amendment relates to criminal proceedings, to penalties, and to forfeitures. *Boyd* v. *United States*, 116 U.S. 616. But it does not apply to non-penal civil liability or to proceedings to remove or restrain a person from certain activities or situations because of unfitness or unsuitability. Cf. *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111-112 (deportation); *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-5 (deportation); 8 Wigmore, *Evidence* (3d ed. 1940), § 2257, p. 333 (citing state cases on disbarment and removal from public office). In other words, one cannot claim the privilege against self-*incrimination* on the ground that the testimony sought will subject him to *civil* liability or will show him to be *unsuitable* for a job, position, license, or status he now holds.

The possible "disabilities" petitioner lists (Pet. Br. 16-19) all fall into this latter category (so far as they have any relevance at all). They are prophylactic measures designed to remove dangerous or unsuitable persons from areas in which they can do harm, but they are not criminal or punitive sanctions. See Brief for Respondent, *Communist Party* v. *Subversive Activities Control Board*, No. 48, this Term, pp. 87-101, 164-209. If any of these disabilities should ultimately be imposed upon petitioner as a result of his answers to the grand jury's questions, it will not be to punish him for his past acts but

because his testimony, in the view of the proper authorities, demonstrates that he is now unfit, unsuitable, untrustworthy, or dangerous. His situation would be comparable to that of a witness who has revealed, pursuant to an immunity statute, a long course of embezzlements of public funds; such a witness obviously cannot claim an immunity against his ousting from public employment as a self-revealed thief.

Furthermore, petitioner makes no showing as to which, if any, of these sanctions he personally fears. For example, he makes no showing that he is (and it is our understanding that he is not) a federal employee, defense facility employee, longshoreman, merchant mariner, member of the armed forces, official of an international organization, radio station operator, university professor, state or city employee, school teacher, or union official. Not only is the privilege confined to facts reasonably having a tendency to criminate, it "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike v. United States*, 227 U. S. 131, 144.[8] The mischief which would result if the privilege were now to be converted into a right of silence where a witness feared that non-criminal sanctions *might possibly* attach at some indeterminate future date is obvi-

[8] See also *Mason v. United States*, 244 U. S. 362, 365-6; *Rogers v. United States*, 340 U. S. 367; *Blau v. United States*, 340 U. S. 159; *Hoffman v. United States*, 341 U. S. 479, 486-7; *Emspak v. United States*, 349 U. S. 190, 205-6 (Mr. Justice Harlan dissenting).

ously incalculable. There would be an absolute right to silence, since there could be no standard by which to determine the validity of such a broad claim of privilege.

2. Let us assume, however, that petitioner is right in saying that these non-criminal sanctions "*must* be regarded as reason for invoking the 'privilege'" (Pet. Br. 19), *i.e.*, that these sanctions are really foreseeable and are true penalties or forfeitures in the criminal sense. Since an immunity statute "should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned" (*Heike* v. *United States*, 227 U. S. 131, 142; *Shapiro* v. *United States*, 335 U. S. 1, 19), it would follow that the 1954 Act should be read, if possible, as granting petitioner immunity against these sanctions.[9] That could well be done because Section (c), *infra*, pp. 54-55, does not limit itself to criminal prosecution but also covers "any penalty or forfeiture, for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence". Therefore, if petitioner is correct in his contention as to the nature of the "disabilities" he catalogs, he will be able to assert his immunity if the Government should hereafter attempt to impose these sanctions upon him. *If* he

[9] We refer mainly to the federal "disabilities"; for the state "disabilities" see *infra*, pp. 31-35.

has a right to protection, he is fully protected." See *Regan* v. *New York*, 349 U. S. 58, 62-64, requiring the witness to testify, and leaving for later determination the validity of his waiver of his statutory immunity.

C. The 1954 Act does not, and need not, bar prosecution for future criminal acts.

Petitioner also challenges the 1954 Act on the ground that compelled testimony may be used against a witness, directly or indirectly, in a prosecution for violation of law occurring subsequent to his testimony. In this connection, he points especially to a continuing conspiracy (Pet. Br. 24).

As petitioner states (Pet. Br. 21), the Immunity Act of 1954 does not grant immunity from prosecution for future law violations. It is axiomatic that the privilege against self-incrimination relates solely to facts tending to subject one to prosecution for present or past crime. It has no relation "to future acts that may or may not be committed." *United States* v. *Kahriger*, 345 U. S. 22, 32; *Lewis* v. *United States*, 348 U. S. 419, 422. Consequently, an immunity statute need not bar prosecution for future crime. It absolves a witness from criminal liability for crime committed, and does not provide him with a license to commit crimes in the future.

We have found no cases decided by this Court which involve prosecution for criminal acts committed subsequent to testimony compelled under an immunity statute. However, petitioner cites four cases in lower federal courts as being of this

nature (Pet. Br. 21). Two of the cases (*United States* v. *Moore*, 15 F. 2d 593 (D. Ore.) and *United States* v. *Swift*, 186 Fed. 1002 (N. D. Ill.)) involve continuing conspiracies, and are in disagreement as to the result. In the *Moore* case, the court sustained a plea in bar, holding that prosecution would not lie for a conspiracy concerning which evidence was given by the defendants under immunity, even though one overt act occurred subsequent to the giving of the evidence. In the *Swift* case, a motion to quash the indictment was denied, the court holding that the continuation of the conspiracy resulted in a new violation of law to which immunity did not extend, and that facts testified to under immunity, if legally competent and relevant, could be shown at the ensuing prosecution.

United States v. *Smith*, 206 F. 2d 905 (C. A. 3), and *United States* v. *Frontier Asthma Co.*, 69 F. Supp. 994 (W. D. N. Y.), also cited by petitioner, were not conspiracy cases. In the *Smith* case, the court held that, although the defendant testified before the Office of Price Administration under an immunity statute, he was not immune from prosecution for subsequent income tax evasion, even if the revenue agents used information given before the O. P. A. The *Frontier Asthma* case merely held that where individual defendants had testified under immunity to facts occurring before April, 1943, an indictment which only charged acts occurring in 1946 should not be dismissed.

Although prosecution should clearly lie for a fresh conspiracy, or for any other new crime, and

there is no impairment of the witness' privilege on this account, the question remains whether use in aid of the prosecution may be made of the immunized transactions. There is much to be said for the view expressed in the *Swift* and *Smith* cases that it may. Since the purpose of the privilege is solely to protect a witness from being compelled to make disclosures having a tendency to subject him to prosecution for crime already committed, immunity from such prosecution removes the criminality so that the object of the privilege is satisfied and it ceases to apply. If the witness then goes out and commits crime anew, he should not be heard to complain if his previous testimony has, by virtue of his own fresh criminal act, now become of aid, directly or indirectly, to the prosecution for that subsequent act. Cf. *United States* v. *Kahriger*, *supra*, 345 U. S. 22; *Lewis* v. *United States*, *supra*, 348 U. S. 419.

However, if, in a proper case, this Court should decide that prosecution for crime committed after compulsion of testimony can in no way be aided by the compelled disclosures, the language of the 1954 Act is susceptible of a construction consistent with that view. It provides that "no such witness shall be prosecuted * * * for or on account of any transaction, matter, or thing concerning which he is compelled * * * to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding * * * against him in any court." Plainly, the last clause may be read to bar the use of the testimony in "any

criminal proceeding" whether it is a prosecution for crime committed before or after testifying. The prohibition against prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is compelled may be given a similarly broad construction.

Congress has evinced an intention that the statute bar state prosecution, if constitutionally possible, in the interest of giving the witness the "fullest protection." H. Rep. No. 2606, 83d Cong., 2d Sess., p. 7; see the opinion of Weinfeld, D. J., R. 35-6. There is, therefore, reason to think that a construction barring the use of compelled disclosures in aid of prosecution for subsequent crime would not conflict with Congressional intent. Of course, whether the statute should be so construed is not at issue in the present case. The proper application can be given if and when the occasion arises. Cf. *Touhy* v. *Ragen*, 340 U. S. 462, 467; *United States* v. *Harriss*, 347 U. S. 612, 626-7; *Regan* v. *New York*, 349 U. S. 58 (see *supra*, p. 28; *infra*, p. 51).

D. *The Immunity Act of 1954 need not bar state prosecution.*

1. Petitioner contends that the immunity statute fails to confer complete immunity because it leaves him subject to state prosecution (Pet. Br. 28-35). However, this contention has been conclusively rejected in a series of cases culminating in *United States* v. *Murdock*, 284 U.S. 141, where the Court said (p. 149):

> This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against self-incrimination. *Counselman* v. *Hitchcock*, 142 U.S. 547. *Brown* v. *Walker*, 161 U.S. 591, 606. *Jack* v. *Kansas*, 199 U.S. 372, 381. *Hale* v. *Henkel*, 201 U.S. 43, 68. * * * .

As the Court pointed out, the principle applies not only to federal immunity statutes but to those of the states, which, of course, cannot and need not preclude federal prosecution to make the grant of immunity effective as a requirement to testify. See also, to the same effect, *Feldman* v. *United States*, 322 U.S. 487, 491-492, cf. *Regan* v. *New York*, 349 U.S. 58.[10]

[10] Petitioner relies on four federal cases (Pet. Br. 34-35); two in this Court and two in the lower courts. *Marcello* v. *United States*, 196 F. 2d 437, 442 (C.A. 5), expressly recognized the rule of the *Murdock* case and upheld the refusal to answer on the ground of possible incrimination for a federal offense. In *United States* v. *DiCarlo*, 102 F. Supp. 597 (N.D. Ohio), the court conceded, citing *Murdock*, that an investigation under federal law respecting federal matters

Because the immunity statute need not bar state prosecution, it becomes immaterial to this case whether Congress has undertaken to, and can, do so. The question would require decision only if and when a state prosecutes petitioner for matters on which he testified in obedience to the order he has so far defied.

2. If the Court should find it necessary to reach, at this time, the question of the effect of the 1954 Act on state prosecutions, we submit that (a) Congress intended to and did bar state prosecutions, and (b) Congress has constitutional power so to provide. Since these matters have been treated in

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(which is the present case) cannot be impeded by a plea of possible incrimination under state law (p. 603). It merely ruled that, when federal officials directly investigate state crime, the privilege protects the witness from state as well as federal incrimination.

United States v. *Saline Bank*, 1 Pet. 100, concerned a bill in equity for discovery and relief. The Court, in *Hale* v. *Henkel*, 201 U.S. 43, 69, pointed out with respect to the *Saline Bank* case that the prosecution was under the law of the State of Virginia; that the federal court was, simply, administering state law; and that no question of prosecution under another authority was involved. See also Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 191, 197-198, n. 103 (1930). Mr. Justice Holmes' statement in *Ballmann* v. *Fagin*, 200 U.S. 186, that Ballmann "was exonerated from disclosures which would have exposed him to the penalties of the state law" (p. 195) was dictum, as the right of Ballmann to refuse to produce had been upheld on the ground of possible incrimination under Rev. Stat. sec. 5209. Just two months after the *Ballmann* case, the same Court in *Hale* v. *Henkel*, *supra*, held that a witness cannot refuse to answer questions before a federal grand jury in the face of a federal immunity statute on the ground that the immunity does not extend to prosecutions in state courts.

detail by Judge Weinfeld in the District Court (see R. 35-36), we shall merely summarize the arguments supporting these conclusions.

(a) As the House Committee Report makes clear, Congress certainly intended to cover state prosecutions, if it could. See *supra*, p. 31; R. 35-36; Pet. Br. 28-29. The language of Section (e), *infra*, pp. 53-55, is broad enough to carry out this purpose: Without limitation to federal proceedings, the statute flatly provides that "no such witness *shall be prosecuted or subjected* to any penalty or forfeiture" on account of the subject of testimony. As for use of the compelled testimony itself, it cannot "be used as evidence in any criminal proceeding * * * against him *in any court*" (emphasis added). Nowhere is there a restriction to federal tribunals or an exclusion of state courts. The precedent of *Brown* v. *Walker*, 161 U.S. at 607-8 construing the comparable provisions of the Compulsory Testimony Act of 1893 to apply to state prosecutions—should be sufficient authority. Besides, it goes almost without saying that if there be doubt as to meaning, and if coverage of state prosecutions is a precondition to validity, the Act must be read in the broader fashion so as to save it. *United States* v. *Harriss*, 347 U.S. 612, 618; *United States* v. *Rumely*, 345 U.S. 41, 47; *United States* v. *C.I.O.*, 335 U.S. 106 (see also *infra*, pp. 43-44).

(b). The power of Congress to grant immunity, in these circumstances, against state criminal prosecution was first upheld in *Brown* v. *Walker*, 161 U.S. at 606-607, under the Supremacy Clause.

As petitioner's brief points out (pp. 32-33), that ruling has not allayed all doubts. But the recent case of *Adams* v. *Maryland*, 347 U. S. 179, 183, has at least settled Congress' power to preclude use in state proceedings of the compelled testimony itself. The roots of the *Adams* decision in the Supremacy and Necessary and Proper Clauses likewise support the authority of Congress to prohibit all state prosecutions relating to the subject matter of the compelled testimony—where, as here, that subject matter is plainly one in which the interest of the Federal Government is dominant over that of the states. All the crimes covered by the 1954 Act—including espionage, involved in this case—are within the Federal Government's special domain, and Congress's power to prevent and prohibit those crimes necessarily includes the authority to take all steps required to make federal action effective and to protect it against interference from any source. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52. See the discussion in the Brief for the United States as *Amicus Curiae* in *Commonwealth of Pennsylvania* v. *Nelson*, No. 10, this Term, at pp. 9-11, 16-17, 46-49.

II

The Act Does Not Empower the District Court to Grant Immunity or to Approve the Propriety of the United States Attorney's Judgment that the Witness' Testimony Is in the Public Interest

Petitioner strongly contends that the 1954 Act gives the District Court the power to grant immunity (or, at least, to approve the propriety of

the grant) (Pet. Br. 35-46), that this is not a judicial function, and, hence, that the statute must be struck down for violation of the doctrine of separation of powers (Pet. Br. 46-52). The argument falls with its basic premise—that the court grants immunity in its discretion—which is clearly erroneous.

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A. The terms of the Act do not give the District Court power to "grant" immunity or to review the propriety of the United States Attorney's judgment that the testimony of the witness is necessary to the public interest.

The Government is of the view, and the courts below have adopted the construction, that the statute does not give the District Court the power to *grant* immunity. In brief compass, our position is that the statute, in clear and unambiguous terms, (1) *authorizes* the United States Attorney, with the approval of the Attorney General, to apply to the court for an order compelling the witness' testimony if, in a designated class of proceedings before a court or grand jury, the witness has claimed his privilege against self-incrimination and refuses to testify; (2) *empowers* the court to order the witness to testify if the court determines the case to be within the framework of the statute; and (3) *grants* immunity from prosecution to the witness whose testimony is so compelled. Under this construction, the United States Attorney and the Attorney General perform the *executive* function of determining whether the public interest

will be served by this witness, being immunized against prosecution in exchange for his testimony; the court performs the *judicial* function of determining whether this case falls within the purview of the statute; and Congress exercises the *legislative* right of granting amnesty or immunity to the witness in return for his testimony.

A brief analysis of the statute will help to demonstrate the correctness of these views. Section (e), *infra*, pp. 53-55, provides that (1) there must be a proceeding before a grand jury or a case in the District Court; (2) the subject matter must relate to interference with or endangering of, or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the like; (3) it must appear that in the judgment of the United States Attorney the testimony of a witness regarding such matters is necessary to the public interest; (4) the United States Attorney, with the approval of the Attorney General, shall make application to the court requesting that the witness be required to testify; and (5) upon order of the court the witness shall not be excused from testifying or producing evidence. There then follows the provision that the witness shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence.

As this summary shows, there is no language in the statute which suggests that the District Court is empowered to review the judgment of the United States Attorney, as approved by the Attorney General, that the witness' testimony is necessary to the public interest and that a grant of immunity is warranted. The whole emphasis is on the "judgment" of the United States Attorney and the "approval" of the Attorney General; the "order of the court" to which Section (c) refers is not bottomed upon the court's "approval" or upon exercise of the court's own discretion. This is made particularly clear by Sections (a) and (b) of the Act (*infra*, pp. 52-53) which relate to congressional investigations (not involved in this case) and provide expressly that the court must *approve* the Committee's grant of immunity to the witness before his testimony may be compelled. In these circumstances, as the courts below observed,[11] "it is logical to assume that had the Congress intended, with respect to grand jury and court proceedings, to vest the same discretion and power of approval in the court as in the instance of congressional investigations it would have used the very language employed in the section dealing with congressional committees" (R. 38).

Moreover, the function actually performed by the court is solely judicial. Absent a statute granting immunity from prosecution to a witness who has validly invoked his privilege against self-

[11] The Court of Appeals adopted the reasoning and conclusions of the District Court's opinion (R. 55).

incrimination, the courts are powerless to compel him to answer. Under this Act, the court is empowered to order the witness to answer when it appears (1) that the conditions specified in the statute, and outlined above, exist and (2) there is no other legal objection to the compulsion of the witness' testimony. In this manner the order of the court gives assurance that the immunity power will not be dissipated in cases outside the framework of the congressional plan and that the witness will be protected from subsequent prosecution touching the matters about which he is compelled to testify.[28] This is concededly a judicial function.

This construction of the statute, adopted by both courts below and plainly required by its language, eliminates the need to consider the asserted constitutional problem which would arise if there were ground for the suggestion that the District Court is called upon to determine the propriety of granting immunity.

B. *The legislative history of the Act, so far as it is pertinent, supports our construction that Congress did not impose a non-judicial function upon the District Court.*

1. *The Report of the House Judiciary Committee sustains our interpretation.* Straining for an unconstitutional construction, petitioner argues

[28] This, for example, the court would be obliged to dismiss an application for an order compelling the witness' testimony if the application alleged that the proceedings in which the witness had appeared involved a violation of the Internal Revenue Code, or were being held before an administrative agency, or that the Attorney General had refused his approval

that the legislative history of the statute supports his view that Congress intended to vest a non-judicial function in the District Court. But there is nothing in the history which compels this construction. The most authoritative extrinsic aid in ascertaining the intent of Congress is the report of the House Committee on the Judiciary (H. Rep. No. 2606, 83d Cong., 2d Sess., Aug. 3, 1954) which accompanied S. 16—the 1954 Act—as it finally was enacted. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474; see *Gooch* v. *United States*, 297 U. S. 124, 127. And this Report fails to justify petitioner's reading of the statute, as an examination of the quotations which petitioner selects (Pet. Br. 40) will illustrate. The first quotation, from page 4 of the Report, merely affirms that the measure requires that "*application be made to a court* after the approval of the Attorney General," an undisputed proposition which is no help to the petitioner. Petitioner then quotes from page 8 of the Report where, with reference to witness *before committees of Congress*, it is said:

> Finally, before the immunity is actually granted to the witness, the approval of the United States district court wherein the inquiry is being conducted is to be obtained.

As we have noted (*supra*, p. 38), this observation is, if anything, adverse to petitioner's view since the provision regarding witnesses before grand juries significantly omits any requirement of "approval" by the District Court.

Nor is petitioner aided by his last quotation which omits the very pertinent language, which follows the first sentence quoted on page 40 of his brief. After the statement that "(i)n cases before a grand jury or a court similar precaution exists," the Committee Report goes on to say:

> In such instances, if a United States attorney decides that in an authorized matter immunity should be granted to a witness who has claimed his privilege, that prosecutor, *having adjudged such testimony to be necessary in the public interest*, must first obtain the approval of the Attorney General for such grant and then apply to the court for the *necessary instruction* to the witness to testify or produce evidence. All conditions must be complied with before the grant of immunity can be given the witness. [Emphasis added.]

As the courts below concluded, "(t)his language hardly supports the view that the court is to exercise a discretionary function or a veto power as to whether the testimony of the witness is required in the public interest. The 'necessary instruction' to the witness appears to refer to the usual direction or instruction issued by a court whenever a witness refuses, without legal justification, to answer questions before a grand jury or court. This instruction or order issued only after the witness has been afforded an opportunity to advance his objections, forms the basis of subsequent proceedings for failure to comply." (R. 40).

The Debates Preceding the Statute's Enactment are Inconclusive:—Petitioner also quotes some excerpts from the debates in Congress which preceded the statute's enactment. But little aid can be drawn from these remarks. It is apparent, from the excerpts quoted by petitioner, as well as from the legislative history itself, that most of the discussion in Congress was centered upon that portion of the measure which related to investigations by congressional committees. The few statements offered by the petitioner relating to Section (c) of the statute (the grand jury and court section), notably those of Representative Keating (Pet. Br. 41-2), are too general in their references to court action to form a solid foundation for overthrowing the Act's clear wording and the Report of the House Judiciary Committee. And in relying on Representative Keating's earlier views as to non-participation by courts (Pet. Br. 37-39), as proof that in rejecting his bill the House Judiciary Committee was inclining towards petitioner's interpretation of the statute, petitioner overlooks the numerous substantial changes which caused the Committee to draft a markedly different bill; not only as a substitute for Representative Keating's bill, but also for the bill which passed the Senate. See R. 41-2. In sum, as the District Court concluded from its careful analysis (R. 42), "The most that can be said for the legislative history is that it is on the whole inconclusive."

C. If there be doubt, the construction of the statute which avoids the constitutional question should be preferred

As we have shown (*supra*, pp. 36-39), the Act itself lends no support to the argument that constitutional doubt should be found by holding that the District Court is required to judge the desirability, from the viewpoint of the public interest, of ordering the witness to testify in exchange for a grant of immunity. In these circumstances, petitioner's attempt to create an issue of validity is decisively answered by the familiar teaching that "even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U. S. 22, 62; *United States v. Rumely*, 345 U. S. 41, 45; *United States v. C. I. O.*, 335 U. S. 106, 121. We think the construction found by the courts below is more than "fairly possible." It is the natural and reasonable import of the statutory language, and it disposes, of course, of petitioner's contention that the Act imposes a non-judicial function upon the court which violates the separation of powers doctrine.

We need only add, with reference to petitioner's analysis of the commentaries and decisions which are said to suggest that the determination of whether immunity ought to be given to a specific individual involves a "delicate policy judgment" (Pet. Br. 48) and hence "is not the stuff of judicial decision" (Pet. Br. 49), that Congress has, as

shown above, properly placed that judgment in the hands of those most capable of exercising it, the United States Attorney and the Attorney General.

D. *Petitioner cannot question the validity of the statutory provisions relating to Congressional investigations*

There remains to consider petitioner's argument that Sections (a) and (b) (dealing with witnesses before Congressional committees) are unconstitutional and that, therefore, the Court should strike down Section (c) as well (Pet. Br. 51-52).

Sections (a) and (b) have not been applied to petitioner, and it is settled that a litigant can question a statute's validity only *when* and *so far* as it is being or is about to be applied to his disadvantage. *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289; *Blackmer v. United States*, 284 U. S. 421, 442; see also *Commonwealth of Massachusetts v. Mellon*, 262 U. S. 447; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576. Otherwise, the Court would constantly be deciding constitutional questions without any necessity therefor, contrary to the basic canon of constitutional adjudication. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346-347.

Moreover, even if it be assumed *arguendo* that Sections (a) and (b) are unconstitutional, it obviously cannot be said that the provisions relating to grand juries are so connected with or dependent upon those pertaining to Congressional investigations that the former would not have been adopted

without the latter. The inquiry of a grand jury and an investigation by a Congressional committee have entirely separate and distinct objectives. Cf. *Hale v. Henkel*, 201 U. S. 43, 65, and *McGrain v. Daugherty*, 273 U. S. 135, 177-179. Further, whether provisions of a statute are so interwoven that if certain ones are held invalid the others must fall, presents a question of legislative intent. *Carter v. Carter Coal Co.*, 298 U. S. 238, 312-313, and cases cited therein; *Williams v. Standard Oil Co.*, 278 U. S. 235, 243. The Congressional desire that Section (c) is to be considered wholly independent of Sections (a) and (b) was clearly expressed by Representative Keating, a member of the Judiciary Committee and one of the bill's leading proponents, who stated that the bill could be "divided into two *separate parts*, sections (a) and (b), having to do with the investigating procedure before a congressional committee and section (c) dealing with the granting of immunity in a court or grand jury proceeding." (100 Cong. Rec. 12603; emphasis added).

In these circumstances, the absence of a separability clause would not be decisive. See *Steward Machine Co. v. Davis*, 301 U. S. 548, 598. Section (c) is independent and valid and may therefore stand and be enforced. *Dorchy v. Kansas*, 264 U. S. 286, 289-290; *Field v. Clark*, 143 U. S. 649, 695-697; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565. Furthermore, it should be noted that the Immunity Act of 1954 is an amendment to Section 3486 of Title 18 of the United States Code

(see *infra*, p. 52), and Section 18 of the Act of June 25, 1948, which recodified Title 18, does contain a separability clause. 62 Stat. 683, 862. The usual strong presumption of separability therefore applies in its full force to this case. *United States v. Harriss*, 347 U. S. 612, 627; *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419, 433-437.

E. Under the proper construction of the Act, the District Court had sufficient evidence before it to permit a judicial determination that petitioner should be ordered to testify and produce evidence.

The proper construction of the Immunity Act, as we have shown, does not impose upon the court any duty to determine the propriety of the United States Attorney's judgment that it is necessary to the public interest that the witness be compelled to testify in exchange for the statutory immunity. This being so, the District Court properly refused to consider those matters advanced by the petitioner which were directed towards proving that the United States Attorney's judgment was unwise, improvident or unsound. But the District Court was given facts upon which it could, and did, determine that: "(1) the grand jury . . . proceeding relates to investigations in cases involving matters enumerated in section (c); (2) the United States Attorney certifies with respect to such matters it is necessary in the public interest that the testimony of the witness who has claimed his privilege be ob-

tained in exchange for a grant of immunity; (3) the Attorney General approves the application; (4) no other legal objection exists to the compulsion of the witness' testimony" (R. 38).

III

The Grand Jury's Questions Relating to Communist Affiliations of Petitioner and Others Were Proper and Relevant to Its Inquiry and Not Violative of the First Amendment

Petitioner contends next (Pet. Br. 55-58) that he could not be asked questions as to his Communist Party membership because (a) such inquiry is forbidden by the First Amendment and (b) the questions were irrelevant to the grand jury's inquiry.

A. In support of his First Amendment claims, petitioner begins by characterizing the grand jury's questions relating to his membership in the Communist Party as solely an "inquiry into" "political membership and associations," although he appears to concede that this Court has not adopted that view. In this connection, he attempts to dismiss as irrelevant those cases which, consistent with this Court's view, have upheld the power of *Congress* to inquire into Communist Party membership. *United States* v. *Josephson*, 165 F. 2d 82 (C.A. 2), certiorari denied, 333 U.S. 838; *Lawson* v. *United States*, 176 F. 2d 49 (C.A. D.C.), certiorari denied, 339 U.S. 934; *Barsky* v. *United States*, 167 F. 2d 241 (C.A. D.C.).

There is nothing in the First Amendment, however, to support the suggestion that such an inquiry

is necessarily forbidden to a grand jury in appropriate cases while it is permitted to a Committee of Congress. Obviously, the question of whether the inquiry infringes First Amendment rights is not determined by the identity of the branch of the Government which asks the questions. Moreover, the experience which teaches that Communist Party membership may be a highly significant fact in legislative investigations concerned with the national security is at least as pertinent for a grand jury, like the one here, inquiring into possible cases of espionage. See Brief for Respondent, *Communist Party* v. *Subversive Activities Control Board*, No. 48, this Term, at pp. 43-61, 94-97.

B. Similar reasoning disposes of petitioner's claim that the questions were irrelevant to the grand jury's business. It may be noted, first, that the witness "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." *Blair* v. *United States*, 250 U.S. 273, 282; *Nelson* v. *United States*, 201 U.S. 92, 115; *United States* v. *McGovern*, 60 F. 2d 880, 888, 889 (C.A. 2). In any event, it was obviously relevant to the grand jury's investigation into whether certain individuals furnished unauthorized information to the Soviet Union to ascertain if such individuals were members of the Communist Party during the period when the information was allegedly furnished. It is difficult to think of a circumstance which would more clearly reflect a motive for furnishing such information than membership in an organization which

is believed, on powerful evidence, to be part of an international conspiracy centered in the Soviet Union. See, *e.g.*, *Dennis* v. *United States*, 341 U. S. 494; *Communications Assn.* v. *Douds*, 339 U. S. 382, 422 *et seq.* (Mr. Justice Jackson, concurring and dissenting, each in part); *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531 (C. A. D. C.), pending on writ of certiorari, No. 18, this Term; and Brief for Respondent in No. 18 (referred to above).

It was clear from the very first question propounded to petitioner (R. 2) that the grand jury was seeking to ascertain what knowledge he had concerning a conspiracy to transmit national defense information to members of the Communist Party and thence to agents of a foreign power during World War II. The testimony sought from petitioner relative to his own membership and that of others went to the very heart of the allegations being considered by the grand jury. Petitioner's observation (Pet. Br. 57) that membership in the Communist Party is not a crime is beside the point. Plainly, the bounds of a grand jury's power are not limited to requiring testimony which in itself affirms or denies the commission of a crime. It is equally clear that the testimony petitioner withheld was properly sought by the grand jury in its inquiry into the crime of espionage.

We have already (*supra*, pp. 21-23) responded to petitioner's charge that the questions are improper because they are designed to entrap him into a perjury prosecution. We are certain that

this Court will reject any such speculative contention fashioned to impugn the motives of the prosecuting officials of the Department of Justice and will agree with this observation of Judge Gialston, below, that "[t]he good faith of the Attorney General when he acts under Section 3486(c) should be assumed" (R. 60).

IV

The District Court's Order Requiring Petitioner to Testify And Produce Evidence Subject to the Provisions of the Immunity Act Is Proper In Form and Affords Him Full Protection From Subsequent Prosecution

Finally, petitioner contends that the District Court's order is invalid for failure to contain an express grant of immunity (Pet. Br. 58). As we have noted earlier, however (*supra*, pp. 36-37), the immunity has been granted by Congress itself in the terms of the statute. It arises by operation of law when all the conditions specified in the Act have been met and the witness has testified in compliance with the court's order. This being true, there is no necessity for a grant of immunity in the order itself. At the outset, the order recites that the United States Attorney has made application for an order instructing the petitioner to testify "pursuant to the provisions" of the immunity statute (R. 44). The order then specifically states that petitioner is ordered to testify "subject to the provisions" of the immunity statute (R. 46). Clearly, he is being compelled under the statute and is protected by the statutory immunity from subsequent prosecution, penalty, or forfeiture touching the subject matter of his testimony.

It is no defect that petitioner may not now be able to tell the precise bounds of his immunity, both because no one knows what prosecutions may be attempted to be brought in the future and also because there may be a dispute as to the meaning of the statutory terms "prosecution", "penal[illegible]", and "forfeiture." See *supra*, pp. 24-28. When the proper time comes, petitioner will, of course, set up his claims and he will then be accorded his entire due under the 1954 Immunity Act. His present position is certainly less difficult than that of Regan who has been required to testify even though it is now uncertain whether his waiver of immunity is valid or invalid. *Regan v. New York*, 349 U.S. 58.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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NOVEMBER 1955

The Immunity Act of August 20, 1954, Public Law 600, 83rd Congress, 2d Sess., ch. 769, 68 Stat. 745, 18 U.S.C. 3486 (Supp., II), amends Section 3486 of Title 18 of the United States Code to read as follows:

§ 3486. Compelled testimony tending to incriminate witnesses; immunity

(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the

transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and

that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall

be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court.

(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212 (a) (27), (28), (29) or 241 (a) (6); (7) or 313 (a) of the Immigration and Nationality Act, (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted

or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

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SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

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Amendments to the Constitution, that it cannot be impaired by legislation designed to compel testimony. The Guild therefore, with the consent of the parties, presents this brief to the Court.

ARGUMENT:

POINT: The self-incrimination clause of the Fifth Amendment is a bar to a compulsory testimony statute.

I. The plain wording of the Fifth Amendment precludes Congress from compelling self-incriminating testimony.

The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself". Legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal proceeding to *be a witness against himself, unless it should be provided* by statute that criminating evidence extracted from a witness against his will should not be used against him." *Counselman* v. *Hitchcock*, 142 U. S. 547, 564-5.

The authors of the Bill of Rights were painstaking writers, and where they intended exceptions and provisos to be engrafted, they were careful to add them. In a later clause of the Fifth Amendment, for example, they wrote: "nor shall private property be taken for public use". They might well have stopped there, leaving it to the courts to make the reasonable inference that the prohibition could be avoided if the injured person were but fully indemnified. Had they stopped there, justification of a compulsory testimony statute might follow by similar inference. But the condemnation clause continues, to make the condition of avoidance most explicit: "nor shall private property be taken for public use, *without just compensation.*" (Emphasis added.)

It is reasonable to infer that the spelling out of the proviso in the one clause and its omission in the other were both deliberate and meaningful. The distinction is far from accidental. In return for the condemnation of property, equivalent monetary indemnification could reasonably be provided. A man may be expected, for the public good, to relinquish one parcel of land in exchange for the money to buy another of equal value.[1] But if a man's reputation is condemned in the public interest, no compensation, in the form of immunity or otherwise, will buy another. While fire insurance may provide equivalent value for property destroyed by fire, life insurance hardly plays a similar role.

The dissenting Justices in *Brown* v. *Walker*, 161 U. S. 591, recognized this when they said, at p. 610:

> "It is too obvious to require argument that, when the people of the United States in the Fifth Amendment to the Constitution, declared that no person should be compelled in any case to be a witness against himself, it was their intention, not merely that any person should have such immunity, but that his right thereto should not be divested or impaired by any Act of Congress."

The Constitution does not, of course, prevent a person from waiving the privilege, nor does it preclude Congress from offering immunity as an incentive to such waiver. *Adams* v. *Maryland*, 347 U. S. 179 (1954); *McCarthy* v. *Arndstein*, 266 U. S. 634, 642. Indeed, such need as a grand jury may have to obtain self-incriminating informer testimony can be served most adequately by offers of immunity voluntarily accepted in exchange for evidence on the basis of which others can be prosecuted.

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[1] It should be noted that even the proviso of the condemnation clause is strictly construed in favor of the owner of condemned land. In determining the measure of "just compensation", "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered * * *." *Olson* v. *U. S.*, 292 U. S. 246, 255.

The benefits of a grant of immunity can in turn be waived, and *Regan* v. *New York*, 349 U. S. 58, holds no more than this.

But the Constitution does not permit the compulsion of testimony in exchange for an immunity neither sought nor accepted, for "compulsory discovery * * * is contrary to the principles of a free government. It is abhorrent to the instincts * * * of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd* v. *U. S.*, 116 U. S. 616, 631-2. As Mr. Justice Black, dissenting in *Regan* v. *N. Y.*, *supra*, at p. 67, said: "The Fifth Amendment accords an unqualified privilege to be silent when asked questions answers to which would make those persons witnesses against themselves. *See, e.g., Blau* v. *U. S.*, 340 U. S. 159, 161."

Brown v. *Walker*, *supra*, and the line of cases which followed it are, we know, to the contrary. "But the ultimate touchstone of constitutionality is the Constitution itself and not what we [the Court] have said about it." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, concurring opinion, 487, at 491-2.

The Court should therefore reconsider and repudiate the doctrine of the *Brown* case.

II. The history of the privilege demonstrates that the clause was designed to guard against compulsory confessions of political and religious "heresy".

From the naked words of the Fifth Amendment, and as no more than a student-exercise in statutory construction, we can conclude that the privilege was intended to confer an unqualified right to silence where answers might tend to incriminate the witness. But with a wealth of history behind the clause, we can find added support for the principle which the words so clearly proclaim.

If the privilege could be said to have a single spiritual father, the choice would fall upon John Lilburn, whose trial (1637-45) focussed the attention of the whole of England upon the evils of the Star Chamber and High Commission proceedings. Lilburn's stubborn refusal to take the oath and to be a witness against himself was no isolated act of individual protest, but was representative of a growing rebellion on the part of hundreds of others. Protest was strong enough, among those who stayed in England, to accomplish the demise of the Star Chamber and the Court of High Commission in 1641 and by the early 1650's the privilege was so well established in the customary laws of England that no English Parliament thought it necessary to pass legislation to ensure it.[2] The determination to outlaw forced confession was even stronger among those who fled to the colonies to escape persecution for political and religious dissent, so that a maxim which remained "a mere rule of evidence in England became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker*, *supra*, at p. 597. And even prior to 1789 seven American state constitutions guaranteed the privilege against self-incrimination.[3]

It is customary to explain and justify the privilege by saying that it "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Feldman* v. *U. S.*, 322 U. S. 487, 489. The authors of the Bill of Rights would not have rejected this formulation, but it is doubtful that it truly reflects their reasoning or their purpose. They would hardly have voiced the truism that the privilege is for

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[2] R. Carter Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. R. 763; 770-4.

[3] Id. at 765.

the innocent as well as the guilty. For they were not primarily concerned with procedural safeguards for those suspected of involvement in ordinary crime. Their concern was indeed for the "guilty"—those "guilty" of dreaming of the death of the King, those "guilty" of heretical thoughts. Their effort was to give not merely procedural protection, but to afford to the dissenter full immunity from punishment for the crimes of religious heresy and treasonable thoughts. They knew that heresy—political or religious—is hard to detect and prove. There is no corpus delicti, no scene of the crime. A search of the suspect's home or work-place yields, at best, only books and papers. Unless the heretic can be forced to confess (or his brother-dissenter to inform upon him), his "crimes" may well go undiscovered and unpunished. The Fifth Amendment, by forbidding compulsory testimony, would, they thought, make it impossible to convict anyone for his religious or political beliefs and associations.

The history of the privilege was lost sight of for many years, during which the whole concept of religious and political crime was unknown in American law. In American law of the past 100 years or more the privilege has been the refuge, in the main, of persons suspected of common crimes. It has been used to avoid confessions of connection with narcotics peddling, tax evasion, gambling, illegal distillation of whiskey, bribery, graft and the like.[4] It is only in the last five or six years that the privilege has again become associated with questions concerning political belief and affiliation, and this is largely due to the diminished vigor, under recent court interpretations, of the First Amendment in its intended role as guardian of political freedoms.

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[4] The leading federal cases are all concerned with common crime: See e.g., *U. S. v. Zwillman*, 108 F. 2d 802 (2d Cir., 1940) (violation of liquor law); *U. S. v. Weisman*, 111 F. 2d 260 (2d Cir., 1940) (violation of narcotics laws); *Smith v. U. S.*, 337 U. S. 37 (OPA violations); *Feldman v. U. S.*, 322 U. S. 487 (using mails to defraud); *Regan v. New York*, 349 U. S. 58 (bribery); *Heike v. U. S.*, 227 U. S. 131 (conspiracy to commit fraud), etc., etc.

The First Amendment and the privilege against self-incrimination of the Fifth Amendment share a common heritage and a common purpose. (It is no accident that the crime which John Lilburn refused to confess was that of printing heretical and seditious books.)

Because of the failure of the courts in *Lawson* v. *U. S.*, 176 F. 2d 49, cert. den. 339 U. S. 934 (1950) and other cases[5] to uphold the right of witnesses, under the First Amendment, to refuse to testify before congressional committees as to political belief and affiliation, the Fifth Amendment privilege has been called upon to perform its original dual function.

Today it is the political dissenters again who are the targets of attempts to compel self-incriminatory testimony. The Immunity Act (18 U. S. C. § 3486) was originally proposed (S. 16 and H. R. 6899, 83rd Cong.) as a bill to permit the compelling of testimony as to *any* type of crime. But the Act was narrowed, before passage, to apply only with respect to investigations "relating to any interference with or endangering of * * * the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of the Government by force or violence." It was aimed directly at investigation of Communism.[6] The attempt is thus made to destroy the efficacy of the privilege in precisely the area—political dissent—in which it was designed to offer protection.

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[5] *Barsky* v. *U. S.*, 167 F. 2d 241, cert. denied 334 U. S. 843 (1948); *U. S.* v. *Josephson*, 165 F. 2d 82, cert. denied 333 U. S. 838 (1948), rehearing denied 339 U. S. 971 (1950).

[6] The amendment was explained to Congress by Rep. Keating, the sponsor of the bill in the House, as follows: "* * * this bill as now worded and now before us exclusively applies only to investigations dealing with or prosecutions for the crimes treason, sabotage, espionage, sedition, seditious conspiracy, and violations of certain specific statutes, *all of which deal with Communist conspiracy*" (100 Cong. Rec. Daily Ed. 12603, Aug. 4, 1954). (Emphasis supplied.)

III. The *Counselman* v. *Hitchcock* formula—equivalent legislative protection—cannot be achieved.

It is curious that the leading case in which the Court refused to punish a witness who declined to answer self-incriminating questions in the face of an offer of immunity should, through dictum, set the pattern and the doctrine for later incursions into the privilege. The Court, in *Counselman* v. *Hitchcock*, 142 U. S. 547, found that the statute before it afforded insufficient protection to offset the constitutional privilege. But, lacking the self-restraint which is so dominant a characteristic of the Court today, it went on to say, at p. 585:

> "It is quite clear that legislation cannot abridge a constitutional privilege and that it cannot replace or supply one, *at least unless it is as broad as to have the same extent in scope and effect.*" (Emphasis supplied.)

Down through the years, lip service has been paid to this so-called doctrine of *Counselman* v. *Hitchcock*: "The immunity, of course, is required to be complete, that is to say, in all respects commensurate with the protection guaranteed by the constitutional limitation." *Glickstein* v. *U. S.*, 222 U. S. 139, 141.[7]

And yet the earliest and the leading case which sanctioned a contempt conviction under a compulsory testimony statute recognized at once the impossibility of meeting this condition. In *Brown* v. *Walker*, *supra*, the Court said, at p. 605:

> "It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime."

[7] To the same effect, *Smith* v. *U. S.*, 337 U. S. 137, 150; *Heike* v. *U. S.*, 227 U. S. 131; *U. S.* v. *Monia*, 317 U. S. 424, 428, etc.

Nonetheless, the Court found the statute adequate as a substitute for the constitutional protection, saying:

> "A person who commits a criminal act * * * ought not to call upon the courts to protect that which he has himself esteemed to be of such little value * * * ."

Even if we were to accept this curious rationale, which ignores the established principle that neither the tender nor the acceptance of immunity affords any ground for an inference of guilt, *Burdick* v. *U. S.*, 236 U. S. 79, 94, we would still assert that times and circumstances have changed since *Brown* v. *Walker* and that the sanctions which are imposed today and against which the immunity grant offers no protection are of an order different from "disgrace" or "opprobrium". We shall do no more than summarize the portion of the brief of petitioner in the Court below, quoted in the Circuit Court's opinion, 221 F. 2d 760, 761-2, fnote 1 (2d Cir., 1955), where the numerous disabilities faced by persons admitting to Communist Party membership are set forth: possible exposure to prosecution under state law, loss of employment by government and private industry, impossibility of obtaining and retaining certain business and professional licenses, forfeitures of public housing accommodations, refusal of passports, denaturalization and deportation and, we might add, deprivation of the right to a place on the ballot after compliance with all local law, *Salwen* v. *Ries*, 16 N. J. 216 (1954). The list is impressive and cannot be ignored.

We shall not repeat this argument but would rather stress that the witness who is asked whether he is a member of the Communist Party or affiliated therewith is confronted with two further hazards, whether he answers "yes" or "no." Against these hazards, the Immunity Act offers no shield. If he answers "no", he faces prosecution for perjury on account of the compelled testimony itself; if he answers "yes", he may be indicted for continuing participation in a criminal conspiracy.

In granting immunity from prosecution on account of the compelled testimony, the Act specifically excepts "prosecution for perjury * * * committed while giving testimony * * * under compulsion * * *." (18 U. S. C. 3486(d)). And such a provision is, of course, valid and is even implied where not expressly included. *Glickstein* v. *U. S.*, 222 U. S. 139.

It is easy to concede that a grant of immunity is not a license to lie under oath. But in an era when the informer-witness is legion (and his tendency to perjury is notorious[8]) and when the concept of what constitutes "membership" in the Communist party is as ephemeral as the court decisions and statutes have caused it to become,[9] the question is not so much whether the witness has lied under oath as whether other witnesses can be found to contradict his testimony.

Commenting on an immunity statute, which contained a similar provision, the dissenting Justices in *Brown* v. *Walker*, *supra*, at p. 622 said of the witness whose testimony was to be compelled:

> "If he declines to testify on the ground that his answer may incriminate himself, he is fined and imprisoned. If he submits to answer, he is liable to be indicted for perjury. * * *. His position in this respect is not that of ordinary witnesses testifying under the compulsion of a subpoena. His case is that of a person who is exempted by the Constitution from testifying at all in the matter. He is told, by the Act of Congress, that he must nevertheless testify, but that he shall be protected from any prosecution, penalty or forfeiture by reason of so testifying. But *he is subjected to the hazard of a charge of perjury, whether such charge*

[8] See, e.g., the comments of Judge Dimock on the informer Harvey Matusow, whose perjured testimony was used to convict defendants in a Smith Act prosecution; *U. S.* v. *Flynn*, 30 F. Supp. 413 (U. S. D. C. S. D. N. Y., 1955).

[9] See *infra*, pp. 11-12.

be rightfully or wrongfully made. It does not do to say that other witnesses may be so charged, because if the privilege of silence, under the Constitutional immunity, had not been taken away, this witness would not have testified and could not have been subjected to any charge of perjury." (Emphasis supplied.)

There is even reason to believe that the possibility of prosecuting the witness for perjury, through the use of informer witnesses, may be the main reason for calling a witness and compelling his testimony under a grant of immunity. Certainly this purpose has been publicly avowed as a reason for calling witnesses before a Senate subcommittee. Senator McCarthy, urging his subcommittee to subpoena certain witnesses in the course of an investigation, said:

> "As to Field, Browder, Jaffe and Stachel—I'd either make them indict themselves or perjure themselves" (N. Y. Journal-American, April 21, 1950, as quoted in *U. S. v. Jaffe*, 98 F. Supp. 191, 195 n. 3 (D. C., D. C., 1951).

That this reasoning is neither fanciful nor hypothetical can be further demonstrated by noting the frequency with which indictments *for perjury* have in fact been brought against Communists and "subversives" who presumably could not, for lack of proof, be prosecuted for any substantive crime. *Hiss, Remington, Lattimore, Bridges, Neff, Gold, Christoffel* and many others are in this category.

Witnesses who are asked questions concerning membership in or affiliation with the Communist Party are also confronted with the difficult task of determining what the true answer to the question may be. The meaning of the term membership has never been easy of definition (see, e.g., Instructions to the Jury in the Bridges Perjury Trial, 10 F. R. D. 81, 96, and the charge to the jury in the first *Remington* case as discussed in *U. S. v. Remington*, 191 F. 2d 246, 248 (2d Cir., 1951). The term has been legislated out of all rational meaning by the Communist Control Act

of 1954 (68 Stat. 775), where fourteen criteria of membership are set forth in Section 5, ranging as far afield as "whether the accused person * * * (12) has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization."

Where the question concerns not "membership" but "affiliation" the waters are muddied even more hopelessly. See *Bridges v. Wixon*, 326 U. S. 135, 141-8. The nature of a perjury indictment based on conflicting testimony as to this type of "sympathy" and "affiliation" was well illustrated in *U. S. v. Lattimore*, 112 F. Supp. 507 (D. C., D. C. 1953).

We turn finally to the question of the effect of a grant of immunity upon self-incrimination for continuing crimes. It is the general rule that immunity protects the witness from past but not from future crimes. *U. S. v. Bryan*, 339 U. S. 323, 340-1 (1950). See *U. S. v. Kahriger*, 345 U. S. 23 (1953), where the court said at p. 32:

> "Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed."

Insofar as offenses committed subsequent to compelled testimony are new substantive crimes, the witness can, of course, be prosecuted for them. And this is true even where the subsequent crime arises from the continuation of a course of conduct testified to under a grant of immunity. *U. S. v. Frontier Asthma Co.*, 69 F. Supp. 994 (D. C., W. D. N. Y., 1947).

The same rule has been applied to participants in a continuing conspiracy. In the famous Beef Trust cases, certain packers who had testified against themselves under a grant of immunity in the 1904 investigation of the Corporations Comm'r, and whose claim of immunity was sustained

in *U. S. v. Armour*, 142 F. 808 (D. C., N. D. Ill., 1906) were indicted in 1910 for the same conspiracy upon evidence gained through leads given in their self-incriminating testimony. The Court, in *U. S. v. Swift*, 186 F. 1002 (D. C., N. D. Ill., 1911), refused to quash the indictment, saying at pp. 1015-16:

> "The indictments in this case are not for any crime committed at the time the privileged evidence was given but for a subsequent crime, and that subsequent crime consists in the continuation of the original agreement * * *. I cannot agree that the immunity act purposely was made attractive as a kind of bonus or bribe to induce innocent disclosures by the promise that a future crime concerning the acts, transactions and things testified about would pass unpunished."

The Court further said, at pp. 1017-18:

> "There is no legal reason why those facts [about which defendants testified under the immunity grant] or the evidence concerning them * * * may not be used to trace the history of, or establish, an unlawful conspiracy charged to have been in operation in 1910 * * *. They must still exist as facts, harmless and pure to be sure, but still tangible facts; and these facts * * * may be shown at any time, in any action, civil or criminal * * *."[10]

A somewhat comparable situation was presented in *U. S. v. Smith*, 206 F. 2d 905 (3d Cir., 1953). Defendant had testified in April, 1946, under an immunity grant, confessing violations of OPA regulations with respect to sales at over-ceiling prices. His immunity from prosecution for these violations was upheld in *Smith v. U. S.*, 337 U. S. 37.

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[10] For an illuminating analysis of these cases see Robert G. Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 Geo. Wash. L. R. 447, 570, at pp. 571-2 (1954). See also Annotation in 157 A. L. R. 428 (1945); at 433 ff. Cf. *U. S. v. Feldman*, 136 F. 2d 394 (2d Cir., 1943), aff'd in 322 U. S. 487 (1944), as commented on in 157 A. L. R. 428, 431.

One month later he was subpoenaed to testify before the Internal Revenue Bureau and in October, 1946 he testified concerning revenues derived from these same sales. In a prosecution for willful evasion of income tax payment for 1946 he pleaded the immunity grant in bar, offering to prove that his testimony concerning OPA violations had served as a lead toward the discovery of the tax violation. The defense was disallowed and his conviction upheld on the ground that, whether or not his immune testimony had served as a lead, the grant of immunity was no defense against crimes not yet committed when the testimony was given. He had testified in 1946 and his tax return for the year 1946 was not due until March 1947. The crime was therefore committed in 1947 and the immunity granted in 1946 could not serve as a bar. See also *Heike* v. *U. S.*, 227 U. S. 131.

This may not be settled law, and there is one case squarely to the contrary. *U. S.* v. *Moore*, 15 F. 2d 593 (D. C., D. Ore., 1926). But the principle announced by these cases, particularly in the light of *U. S.* v. *Kahriger*, *supra*, serves at least to cast serious doubt on the scope of the immunity granted in respect to testimony admitting violations of the Smith Act and the Subversive Activities Control Act. Under the Smith Act (18 U. S. C. 2385), both under the conspiracy and the membership provision, membership in the Communist Party is an element of the crime; while under the Communist Control Act of 1954 the criteria by which membership is to be determined are such as to make it virtually impossible for a person who has once admitted membership to sustain the burden of proving that he has severed the relationship and withdrawn from the "conspiracy". Would it not be possible for one who admitted membership under a grant of immunity today to be prosecuted six months hence for the new crime of continuing in the conspiracy?

Under the registration provisions of the Internal Security Act (64 Stat. 987, 50 U. S. C. 786-787) each day of failure to register constitutes a new and separate crime.

If this Court should uphold the determination that the Communist Party must register and list its members, *Communist Party* v. *S. A. C. B.*, 223 F. 2d 531 (D. C. Cir., 1954), now before this Court on certiorari, and if the Party should fail to register John Doe as a member, would not John Doe's failure to register on the day *following* his testimony under an immunity grant subject him to prosecution? And if this be true, are we not faced with precisely the situation condemned by the Court in *Aiuppa* v. *U. S.*, 201 F. 2d 287 (6th Cir., 1952), where the Court said at p. 300:

> "We are unable to give judicial sanction, in the teeth of the Fifth Amendment, to the employment of * * * methods of examination of witnesses constituting a triple threat: answer truly and you have given evidence leading to your conviction for a violation of federal law, answer falsely and you will be convicted of perjury, refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment."

CONCLUSION

In the light of these arguments, we suggest that the time is ripe for a re-examination of *Brown* v. *Walker* and the tenuous basis on which it so lightly tosses aside the full protection of the Constitution. This is the moment for a new and more careful reading of the Bill of Rights, lest the freedoms so hard won be lost again.

Brown v. *Walker* is of an age with *Plessy* v. *Ferguson*, 163 U. S. 537, and should be accorded no greater validity today. Just as the Court said, in reconsidering the *Plessy* case, that it must do so in the light of the present situation in American life, to determine whether the Constitution's promise of equal protection was being fulfilled, so too the Court should ask itself whether, in these days when the Government is encroaching further and further upon po-

litical freedoms, the guarantee of the Fifth Amendment is adequately maintained.

Respectfully submitted,

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SUPREME COURT, U.S.

MOTION FILED

Supreme Court of the United States

OCTOBER TERM, 1954

No. 581

WILLIAM LUDWIG ULLMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE*

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Supreme Court of the United States

OCTOBER TERM, 1954

No. _____

WILLIAM LUDWIG ULLMAN, Petitioner

vs.

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for Emergency Civil Liberties Committee, respectfully moves this Honorable Court for permission to file the accompanying brief, as *amicus curiae*, in support of a petition for a writ of certiorari. Permission for leave to file has been requested from the Solicitor General of the United States but such permission has been refused. The reason given for refusal by the Solicitor General was, as stated in his letter, "I have concluded, however, that I should not consent to your filing such a brief, particularly since Rule 42(1) of the Rules of the Supreme Court indicates that briefs amicus curiae at the petition stage are not favored by the Court. You understand I am sure that you may file a motion under that Rule for leave to file your brief." While aware that it is true that such briefs as this are not favored by the Court at the petition stage, we hope that the rule is not

indexible and that where, as in the instant case, a grave constitutional issue is present, involving fundamental rights of all our citizens and where the decision whether to grant a writ of certiorari may be crucial, exception to what is undoubtedly a wise rule to conserve the time of the members of the Court may be found possible. The attorneys for the petitioner have consented to the filing of this brief.

WHEREFORE, it is respectfully requested that this Honorable Court grant this motion to file the annexed brief as *amicus curiae*.

ROYAL W. FRANCE,
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104 East 40th Street,
New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1954.

No. _____

WILLIAM LUDWIG UHLMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

BRIEF AS FRIEND OF THE COURT

It is with the deepest concern over what we believe to be threats to Civil Liberties in our country, whose traditions of freedom we cherish, that the undersigned, Emergency Civil Liberties Committee, has requested permission to file this brief. The Emergency Civil Liberties Committee is a non-partisan organization which is opposed to all authoritarian regimes and practices and believes in civil liberties for all.

We hold as a firm tenet of our faith that violent revolutions should never be resorted to in a society where orderly change through the will of the people, freely expressed at the polls, is possible. We believe, however, that radicals as well as liberals and conservatives must, in such a society as ours, be guaranteed the right, within the framework of the democratic process, to urge changes which they seek. They should enjoy peacefully the guarantees of personal liberty contained in the Bill of Rights which are the basis of democracy and we have noted with concern what Chief Justice Warren has recently described as the "eroding of our liberties."

In no area is this tendency more apparent than in the attempt to water down or nullify the protections against

self incrimination contained in the Fifth Amendment. Because we attach the utmost importance to the values which inhere in the Fifth Amendment, we view with grave misgivings the Act under consideration in the instant case under which petitioner has been ordered to testify despite his claim of the privilege against self incrimination.

POINT ONE

The Compulsory Testimony Act of 1954 violates the constitutional prohibition of the Fifth Amendment against requiring a person in a criminal case to be a witness against himself.

We are living again in one of those historic periods when hard won freedoms are being challenged in the name of expediency. In the name of security the rights of the individual person are being more and more impaired. Great tensions in international relations and the fears engendered by new and dreadful weapons have created an atmosphere in which legislators move from one invasion of our traditional liberties to another. In the statute under review it is the time honored privilege against self-incrimination which is threatened. Dean Erwin N. Griswold, of Harvard University Law School, in *The Fifth Amendment Today*, says at page 7:

> "I would like to venture the suggestion that the privilege against self incrimination is one of the great landmarks in man's struggle to make himself civilized. . . . the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. *In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone.*" (Emphasis supplied.)

We have in the instant case the unusual situation that all three of the judges of the United States Circuit of

Appeals for the Second Circuit have made it evident in their opinions that they would have declared the statute unconstitutional if they had not felt themselves to be bound by the decision of this Court in *Brown* v. *Walker*, 161 U. S. 591. But this Court, under changed conditions or in different circumstances, as witness the recent memorable decision in the school segregation cases, has not hesitated to overrule a previous decision of its own. Especially should this be the case when, as in *Brown* v. *Walker*, *supra*, the decision was by a vote of 5 to 4, when the dissenting opinions were so persuasive and when the area involved was not, as now, the critical area of freedom of speech and association. It is when we recall the Star Chamber and the names of Lilburne and Bradford that we discover the true significance of the protection against self-incrimination and why the Founding Fathers wrote it into the Bill of Rights as one of the tenets of their belief that there are areas of personal right into which government may not intrude. Whatever the validity of *Brown* v. *Walker*, *supra*, may be, it does not really touch on the problem of individual freedom which gave rise to the privilege against self-incrimination, although Justice Field recognized that problem as being present even in a case which did not impinge directly on freedom of thought and association when he said at page 637:

> "The essential cruelty of compelling a man to expose his own guilt is obvious to everyone and needs no illustration."

He went on to appraise the statement that the privilege is the

> "result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other."

As the petitioner's brief shows, he has been interrogated over and over again since Elizabeth Bentley named him, he has categorically denied all allegations of crime, he has

never been indicted and prosecuted for substantive crime, as he should have been long ago if the government had real belief in and support for the Bentley charges. Under the circumstances, he may well have felt that if he did not invoke the privilege he might be entrapped. Surely there must be a point where a man may be justified in saying that he has spoken enough.

We concur in the forthright statement of Senator Hoey when he said:

> "I am opposed to the entire bill. I believe we are going right in the face of the Constitution" (99 Cong. Rec. 4742).

POINT TWO

The immunity law does not provide full immunity to the political dissenter in a time when the political heretic is faced with social and economic penalties unprecedented in the history of our country.

It is basic to the validity of an immunity statute that the protection afforded by the statute must be "co-extensive with the constitutional privilege." It must, as was held in *Counselman* v. *Hitchcock*, 147 U. S. 547, be absolute. We pass over what we believe to be the failure of the statute to provide full immunity from either Federal or State disabilities to what we consider even more vital in distinguishing the situation now before the Court from that which it confronted in *Brown* v. *Walker*, *supra*. Political heresy in such a climate as we have today was not then before the Court. At the point where he discussed the effects of disclosure on petitioner's good reputation, Mr. Justice Brown, curiously enough, assumed that he had committed a crime, although as Mr. Justice Shiras pointed out no such assumption was warranted. In stating at page 605 that if the proposed testimony is material to the issue, the fact that it would "tend to degrade the witness in public estimation"

[illegible] not avail him. Mr. Justice Brown gave the following reason why this does not exempt him from disclosure:

> "A person who *commits a criminal act* is bound to contemplate the consequences of exposure to his good name and reputation and ought not to call upon the courts to protect that *which he has himself esteemed to be of little value.*" (Emphasis supplied.)

But Mr. Justice Shiras effectively disposed of what we believe was a misconception of the law in Mr. Justice Brown's opinion when he said at page 598:

> "A moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which he may be entirely unable to explain as consistent with his innocence."

Dean Griswold in *The Fifth Amendment Today*, which we have previously mentioned, gives interesting examples beginning on page 12 of the ways in which innocent persons may be entrapped when not protected by the provision of the Fifth Amendment. These dangers are enhanced by the 14 criteria which may be used as evidence of Communist Party membership enacted in the Communist Control Act of 1954.

To the extent that the majority opinion in *Brown v. Walker, supra*, was based on the assumption that the petitioner there was guilty of criminal conduct, the opinion is not binding in the instant case where there not only is no presumption of guilt but where all the circumstances, including petitioner's sworn denials and the failure of the government after many years to indict him on the basis of the Bentley testimony, support the presumption that there is no implication of criminality from his execution of his constitutional privilege.

It is interesting also that Mr. Justice Brown indicated on page 593 the ease with which questions put to him

(the witness) may assume an inquisitorial character and to *entrap him into fatal contradictions*" and that Mr. Justice Shiras indicated at page 628 the danger of prosecution for perjury as being one of the risks that the immunity law did not guard against. Certainly, if that danger was present there, the danger of entrapment is even more present today with a stable of paid informers of doubtful veracity at the government's disposal and the experience of even so distinguished an educator as Dr. Lattimore (*United States* v. *Lattimore*, 215 Fed. 2nd 847) and of the defendants in *U. S.* v. *Neff*, 212 Fed. 2nd 297; *U. S.* v. *Gebl.*, U. S. C. A. D. C. 12352; *U. S.* v. *Remington*, 191 Fed. 2nd 246, and *U. S.* v. *Bridges*, 199 Fed. 2nd 811, reversed 346 U. S. 209, showing the use which will be made by the government of the statements of dissenters while informers who have served the government, who are self-confessed perjurers, go free.

Not only is the danger of entrapment greater than when *Brown* v. *Walker, supra*, was decided, but the social and economic penalties which may be imposed on a dissenter are different not only in degree but in kind. Nothing of the sort of community sanctions which might be visited on the petitioner threatened the auditor in that case. They include the possibility that one may not even be able to make a living except in the most menial occupations, loss of union or professional status, discrimination in housing and educational facilities and public opprobrium which is not confined to the witness himself but may be visited on his wife and children or even on more remote relatives and associates.

The members of this Honorable Court are certainly aware of the frightening spread of the area of repression. The degree to which constitutional guarantees of freedom of speech and conscience have been impaired has been increasingly viewed with apprehension by clergymen, educators and commentators at home and has caused dismay among our friends abroad. Have we, the most powerful

and least vulnerable of the democracies, shall lose our faith in the value and safety of allowing truth and error to meet in the arena of public discussion and adopted in practice the very methods which in theory we oppose." Over three years ago Mr. Justice Douglas said in an article in New York Times Magazine for January 13, 1952, entitled *The Black Silence of Fear*, that "there is an ominous trend in this nation. We are becoming tolerant only of the orthodox point of view; intolerant toward new and different approaches."

In the able brief in *Emspak v. United States*, recently submitted to this Court on behalf of the petitioner Emspak, a score of pages in the appendix were given over to quotations from prominent editors, religious leaders, commentators and business and political leaders expressing the fears which were so well summarized in the pronouncement of the General Council of the Presbyterian Church in the United States of America, on November 2, 1953, entitled a letter to Presbyterians wherein it was said:

> "Under the plea that the structure of American society is in imminent peril of being shattered by a satanic conspiracy, dangerous developments are taking place today in our national life. Favored by an atmosphere of intense disquiet and suspicion, a subtle but potent assault upon basic human rights is now in progress. . . . Treason and dissent are being confused. The shrine of conscience and private judgment, which God alone has a right to enter, is being invaded. Un-American attitudes toward ideas and books are becoming current. Attacks are being made upon citizens of integrity and social passion which are utterly alien to our democratic tradition. They are particularly alien to the Protestant religion which has been a main source of the freedoms which the people of the United States enjoy." New York Times, November 3, 1953.

Can there be any doubt that the immunity Act here under consideration is one of the last and worst of the anti-

freedom measures recently enacted by Congress. Can there be any doubt that the Fifth Amendment has played a highly important role, particularly in times such as these, in protecting the individual against the awe-inspiring power of the state? Can there be any question but that the Immunity Act permits a further invasion "into the shrine of conscience and private judgment"?

The recently decided *Regan* case, not yet reported, is distinguishable from the instant case both because there the peculiar provisions of the New York law, including the provision under which Regan had signed a waiver, were involved and more especially that the *Regan* case did not fall within the area of political dissent.

We urge upon the Court, even if the doctrine of *Brown v. Walker, supra*, is still to be applied in the ordinary criminal case, that in such a time as that in which we live, even if it grants full judicial immunity, the Immunity Act does not and cannot grant immunity co-extensive with the real injury that an admission of political heresy might entail. Radicals and conservatives alike have important contributions to make to democratic decisions and democracy advances through compromises between differing viewpoints, freely and fearlessly expressed. But today, the admission of political heresy effectively bars the dissenter from public, and increasingly wide areas of private employment. It is not merely admission of membership in the Communist Party but adherence to any of the more than two hundred organizations decided by the Attorney General of the United States, acting as accuser, judge and jury, to be subversive which may involve economic and social disaster.

In *Wieman v. Updegraff*, 344 U. S. 183, Mr. Justice Clark in condemning the use of the Attorney General's list as a basis of loyalty oaths indicated the social consequences which are visited upon the person excluded from public employment at page 190 in these words:

> "There can be no dispute about the consequences visited upon a person excluded from public employ-

ment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed it has become a badge of infamy."

Equally, admissions wrung from a man against his will of membership in so-called subversive organizations, which might become a link in a chain, can become a badge of infamy and a danger to his livelihood against which a spurious immunity cannot protect him.

In a notable advisory opinion with regard to whether a proposed law in Massachusetts to force private and public educational institutions to dismiss teachers for refusing to testify regarding alleged subversive activities on the basis of the Fifth Amendment, reported in the Journal of the House for April 13, 1955, the Justices of the Supreme Judicial Court of Massachusetts made findings which are equally pertinent to the situation in the instant case, where on page 1111 they said:

"It is plain that the proposed section 30B, if enacted into law, and if valid, would apply to a person who had exercised his right under either Constitution at any trial or duly constituted hearing or inquiry, whether within or outside the Commonwealth, to refuse to answer questions pertinent to his membership in the Communist Party, whether present or past, without limitation of time.

"It is the very cornerstone of our system of government that none of the three great departments, the legislative, the executive or the judicial can destroy or impair the constitutional rights of any person. All branches of the government are alike bound by the constitutional mandate. Therefore it must be clear that if the General Court should pass a purported statute to the effect that no teacher should avail himself of his right not to testify or furnish evidence against himself, such purported statute would be in direct contradiction of the constitutional provisions and would be void. So would a statute that should seek to penalize as by fine or imprisonment one who should seek to exercise his constitutional right. It is true that the proposed statute does not quite do either of the things

gust suggested: *But it does something of comparable effect. It makes an indirect but hardly less serious attack upon the constitutional right.* * *

We are of the opinion that the proposed section 3013 would be unconstitutional as an interference with the exercise of the constitutional privilege against self-incrimination.

These consequences would be visited upon a person who had committed no crime, but had merely availed himself of his constitutional right; for it cannot be too often emphasized that the exercise of his privilege not to incriminate oneself does not prove guilt. The privilege is designed to protect the innocent even though it may often be used to shield the guilty." (Emphasis supplied.)

In the Immunity Act we also have an indirect but nevertheless serious attack upon the constitutional right. During this period when First Amendment protections have been seriously if not fatally weakened, the Fifth Amendment has proved to be the only shelter for many a dissenter from the storm which rages about him.

CONCLUSION

Truly, as Lowell said, "New occasions teach new duties." Today is not the same day in which *Brown* v. *Walker*, *supra*, was decided and the situation presented by instant case is not comparable to that presented in that earlier decision. The immunity granted by the statute under consideration is not and cannot be commensurate with the dangers which face petitioner if his constitutional privilege is removed.

We urge this Honorable Court to grant certiorari to permit these questions to be considered.

Respectfully submitted,

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APPENDIX A

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Prof. Calvin D. MacDougall, Ill.

Caleb McWilliams, N. Y.

Prof. Clyde Miller, N. Y.

Prof. Rhoads Mitchell, N. Y.

Dr. Nancy Morse, Mich.

Harry L. Rand, D. C.

Richard L. Ritman, Ill.

Prof. Arnold Rogow, Calif.

Dr. Guy Emery Shipler, N. Y.

Mrs. A. W. Simpkins, S. C.

Bernard J. Somers, N. Y.

I. F. Stone, D. C.

Mrs. Nancy P. Straus, D. C.

Robert Ware Straus, Md.

Paul Sweezy, N. H.

Miss Olive Van Horn, N. Y.

Rev. Arthur E. Wahlstey, Mo.

J. Raymond Walsh, N. Y.

Andrew Weinberger, N. Y.

Frank Wilkinson, Calif.

Henry Willcox, Conn.

Prof. William A. Williams, Ore.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

LEONARD B. BOUDIN,
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WILLIAM LUDWIG ULLMANN,

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PETITION FOR REHEARING

Petitioner, William Ludwig Ullmann respectfully petitions for a rehearing in this matter decided on March 26, 1956. In support of the petition, petitioner respectfully shows and alleges:

I

The Court should reconsider its holding that the District Court has no discretion to deny an order directing response, once application has been made by the United States Attorney with the approval of the Attorney General. The holding rests primarily on a desire to avoid the supposed serious constitutional question of whether the Court's exercise of discretion would be a non-judicial function. There are, however, two reasons why no such dilemma is posed and why discretion should be held to exist.

A. The situation involved here is enforcement of a demand for information by a grand jury. The grand jury is the arm of the court, and unquestionably supervision and control of the grand jury is a judicial function. As this Court has said with respect to grand jury investigations:

> "Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them." Hale v. Henkel, 201 U. S. 43, 65.

In the ordinary case, the District Court has and does exercise its discretion in determining whether to enforce a particular demand by the grand jury. Indeed, such a course is obviously necessary to prevent oppression and abuse of the court's processes. There is no reason, therefore, why the court cannot continue to exercise its discretion in a case arising under the statute, as part of its traditional judicial function of supervision and control of the grand jury.

The District Court, in this case, expressly refused to exercise this discretion although presented with charges and evidence of such oppression and abuse. It even denied petitioner's request that it examine the grand jury minutes to determine whether the grand jury was making a bona fide investigation into crime (S. M. 76).* Such an act of abnegation was, of course, not involved in or decided by *Brown* v. *Walker*, 161 U. S. 591. Indeed, as indicated above, it was explicitly repudiated in the later immunity act case of *Hale* v. *Henkel*, *supra*.

The Court's construction and enforcement of the statute removes from the District Court, *pro tanto*, its historic control over the grand jury, and thus curtails a traditional judicial function. And it leaves unchecked the very real possibility of oppressive use of the grand jury and the court's

* S. M. refers to the stenographic record of the hearing before Judge Weinfeld which is on file in this Court.

processes. No such intention should be ascribed to Congress in the absence of a clear legislative declaration. *Gulf Refining Co. v. Ickes*, 321 U. S. 321.

B. Even if the discretion under the statute is vested in the prosecutors, nevertheless, judicial review is available to determine whether the executive arm has, in the particular case abused its discretion. Review for abuse of administrative discretion in actions vitally affecting individual rights is unquestionably a judicial function. For example, judicial review is accorded to determine whether there has been an abuse of discretionary authority to suspend deportation (*U. S. ex rel. Accardi v. Shaughnessy*, 347 U. S. 260; *Caddeo v. Brownell*, 92 App. D. C. 89, 202 F. 2d 897; *Lim Fong v. Brownell*, 94 App. D. C. 323, 215 F. 2d 683; *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999) or to deny a passport (*Schachtman v. Dulles*, 225 F. 2d 938). See cases cited, Petitioner's Reply Brief, p. 2).

And even if it is not a judicial function to determine whether the witness should or should not have immunity, it is a judicial function to decide not to punish a witness who was offered immunity in an abuse of administrative discretion or for wrongful purposes.

The granting of the statutory immunity obviously visits serious consequences on the witness and vitally affects the administration of justice. It lends itself to serious abuse on a large scale, permitting a prosecutor to substitute political for relevant considerations, and to force witnesses who have no knowledge of acts dangerous to security but who have unpopular views or affiliations to choose between imprisonment for contempt, imprisonment on contrived perjury convictions, and becoming political informers. The record in this very case demonstrates the existence of such a situation. Nor does petitioner stand alone in his subjection to unrestrained executive power. This Court's decision may be a Pandora's box of subpoenas for thousands of citizens on a scale reminiscent of the notorious Palmer

raids directed against aliens. Surely the Court has too lightly assumed that Congress intended to place such unlimited power in the hands of the prosecutor, and that it meant to permit him to misuse the inquisitorial power of the grand jury and the invoked assistance of the courts, all without the slightest safeguard of judicial review.

At the very least, a court retains the authority to determine whether in any particular case the prosecuting authorities have abused their discretion in granting immunity and acted arbitrarily and unfairly. In the present case, the petitioner alleged that this was the situation and filed an affidavit setting out facts to support that conclusion (R. 7-22). The Attorney General did not dispute these facts but argued only that his discretion was not reviewable by the courts. The trial court agreed with the Attorney General and thus failed to examine the facts to determine whether or not in this particular case the Attorney General had acted arbitrarily and abused his discretion (R. 43). Its failure to do so requires that the case be reviewed with directions for the trial court to examine the facts and determine on the record whether or not in this particular case there has been an abuse of discretion by the prosecuting authorities.

II

The Court, in its opinion, stated that it would not discuss "petitioner's argument, relying on the First Amendment, that inquiry into his political membership and associations is unconstitutional" (Opinion, p. 17, fn. 15). This was based upon the statement that petitioner relied exclusively upon the Fifth Amendment in the contempt proceedings. This ruling was erroneous.

A. Petitioner expressly relied upon the First Amendment in objecting to certain questions upon the original proceedings to compel his testimony (R. 43-44). Once having been asserted in those proceedings and overruled, its

explicit reassertion before the grand jury or the contempt proceedings was unnecessary. It should also be noted that the First Amendment issue was argued and briefed by both parties in the court below and in this Court. The Court is in error if it concludes that the remarks of counsel were intended as a waiver of any rights. The Court has overlooked counsel's statement to Judge Murphy: "The grounds of the opposition which we press are summarized by Judge Weinfeld" (R. 50). It was recognized by counsel and court that Judge Weinfeld's decision was the law of the case and that as Judge Murphy said: "The only thing left for me then is to make a finding of contempt" (R. 50).

B. The Court seems to treat the First Amendment like the Fifth in supposing that it must be expressly invoked to justify a refusal. Unlike the Fifth Amendment, objections on First Amendment grounds are not waived by the failure to set them forth expressly. This is because the assertion of rights under the Fifth Amendment does not constitute a challenge to the power of the tribunal to ask the questions, but rests upon only a right to refuse to answer, even if the power to ask exists. But objections on First Amendment grounds, as with objections to relevancy, go to the power of the tribunal to ask the question, and can be relied upon whenever there is a general challenge to the power of the tribunal by a refusal to answer. Cf. *Sinclair v. United States*, 279 U. S. 263; *Bowers v. United States*, 202 F. 2d 447.

It may be that petitioner will wish to purge himself of contempt by testifying on such matters as espionage while still declining to answer questions concerning political membership and association on the ground of the First Amendment. But he should be permitted—if he so chooses—to yield to the grant of immunity without giving up the fundamental rights embodied in the First Amendment. However, such a course will be foreclosed to him unless the Court has decided that issue in his favor. That the issue

is a substantial one, never squarely decided by the Court, as indicated by its grant of certiorari in *Emspak v. United States*, 348 U. S. 809, judgment reversed, 349 U. S. 190, on other grounds.

It is respectfully submitted that the Court should grant reargument on this point in order to determine whether the petitioner can purge himself of contempt although continuing to refuse to answer questions protected by the First Amendment.

III

The Court has placed the petitioner and, indeed, all other American citizens in limbo with its statement that petitioner "has, of course, when a particular sanction is sought to be imposed against him, the right to claim that it is criminal in nature" (Slip opinion, p. 9). For the Court has not told us which of the sanctions discussed in its opinion are regarded by it as "criminal in nature" and hence as no longer to be invoked against petitioner if he purges himself of contempt. Are we to understand that the petitioner, once he has answered the questions put by the grand jury and regardless of his answers, may be employed in defense facilities, be eligible for a passport, not criminally liable after he applies for one, and avoid both registration and internment under the Internal Security Act of 1950 in the event that the latter Act is upheld by this Court in the case now pending?

These are most serious questions deeply affecting petitioner as a citizen and as a business man. The Court of Appeals, under *Cobbledick v. United States*, 309 U. S. 323, held that petitioner would not be able to appeal from the order of Judge Weinfeld directing him to answer the questions. He has now been placed in great doubt and jeopardy because of this Court's unwillingness or inability to state which disabilities remain and which disappear. Petitioner is entitled to be told by this Court whether the sanctions

to which he called its attention as being within the protection of the Fifth Amendment, would become inoperative if he purges himself.

We are not seeking a theoretical statement by the Court as to petitioner's rights. Petitioner, as a litigant in peril of imprisonment and as a citizen who faces other serious sanctions, is entitled to know what this Court meant when it decided that petitioner has the protection of the Fifth Amendment, and what the scope of that protection is, should he purge himself.

IV

The affirmance of the judgment below, which includes the right to purge, creates a substantial problem with respect to the second part of the order directing testimony. The order provides that the petitioner "is instructed to answer the questions propounded to him before the Grand Jury *and* to testify and produce evidence with respect to such matters under inquiry before said Grand Jury" (italics added) (R. 46).

The immunity power is so drastic and the right to purge so important that the order to testify should be limited to the particular questions propounded rather than to give the United States Attorney *carte blanche* to imprison petitioner by asking new questions, never submitted for court approval, as to that amorphous subject, "matters under inquiry before said Grand Jury" (R. 46).

Indeed, under the narrowest view of the function of the District Court under the statute, that function necessarily must include a decision as to what particular questions come within the scope of the statute. It is clear that under this Court's decision, petitioner is required to answer the specific questions which formed the basis of the contempt judgment. However, the order of Judge Weinfeld also directed petitioner to answer all other questions without

specification. True, in a technical sense he has committed contempt only in refusing to answer the questions put to him by the grand jury (see *Wong Gim Ying* v. *United States*, App. D. C., No. 12893, decided March 29, 1956). But in a real sense he stands in peril of further citation for contempt if he fails to answer any questions put in the course of the grand jury's investigation.

Petitioner is entitled to a clear direction as to the specific questions he must answer in order to satisfy the judgment of the court. This can be done either by a clarification of the judgment by this Court, or by a remand to the District Court with direction to set out the specific questions which the petitioner is obligated to answer in order to purge himself of contempt. Thereafter, he must have the right to a judicial ruling on any contested question connected with a grant of immunity.

Respectfully submitted,

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Certificate of Counsel

I, LEONARD B. BOUDIN, do hereby certify that I am counsel for the petitioner herein and that this petition for rehearing is presented in good faith and not for delay.

LEONARD B. BOUDIN.

April 17, 1956.